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IN THE COURT OF APPEALS OF INDIANA

Jason B. Swopshire,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 27, 2021

Court of Appeals Case No. 21A-CR-224

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D05-1911-FB-2

Najam, Judge.

Statement of the Case

[1] Jason B. Swopshire brings this interlocutory appeal from the trial court's denial of his motion to dismiss. Swopshire raises the following two issues for our review:

1. Whether applying amended statutes of limitation to the State's charges against him, which alleged four counts of sexual misconduct with a minor and one count of attempted sexual misconduct with a minor, violates the federal and state constitutional prohibitions against ex post facto laws.

2. Whether applying the amended statutes of limitation here violates the Privileges and Immunities Clause of the Indiana Constitution.

[2] We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] On November 25, 2019, the State charged Swopshire as follows:

- Count 1:[1] sexual misconduct with a minor, as a Class B felony, for engaging in sexual intercourse with a minor between fourteen and sixteen years of age, which act was alleged to have occurred "[s]ometime during the period . . . between the 6th day of March, 2009[,] and the 2nd day of March, 2011 . . . ."
- Count 2: sexual misconduct with a minor, as a Class B felony, for "plac[ing] his mouth on the female sex organ" of a minor between fourteen and sixteen years of age, which act was alleged to have occurred "[s]ometime during the period . . . between the 6th day of March, 2009[,] and the 2nd day of March, 2011 . . . ."
- Count 3: sexual misconduct with a minor, as a Class B felony, for "plac[ing] his penis in the mouth" of a minor between fourteen and sixteen years of age, which act was alleged to have occurred "[s]ometime during the period . . . between the 6th day of March, 2009[,] and the 2nd day of March, 2011 . . . ."

[1] The charges use Roman numerals.

- Count 4: attempted sexual misconduct with a minor, as a Class B felony, for "attempt[ing] to place his penis in the anus" of a minor between fourteen and sixteen years of age, which act was alleged to have occurred "[s]ometime during the period . . . between the 1st day of January, 2011[,] and the 2nd day of March, 2011 . . . ."
- Count 5: sexual misconduct with a minor, as a Class C felony, for "fondling or touching" a minor between fourteen and sixteen years of age, with the intent to arouse or satisfy the sexual desires of Swopshire or the victim, which act was alleged to have occurred "[s]ometime during the period . . . between the 6th day of March, 2009[,] and the 2nd day of March, 2011 . . . ."

Appellant's App. Vol. II at 13-17.

[4] According to the probable cause affidavit filed with the charges, the victim of each alleged offense was the same, and she lived with Swopshire at the time of the alleged offenses. Sometime thereafter, she reported the alleged offenses to Fort Wayne Police Department officers, stating that the facts underlying Count 1 occurred "on average once every other day" during the identified timeframes, while the facts underlying Counts 2, 3, and 5 had occurred on numerous occasions during the identified timeframes. *Id.* at 12. Also during the relevant times, Swopshire was in his mid-thirties.

[5] After the State had filed its charges, Swopshire moved to dismiss the charges on the ground that they had been filed outside the applicable statute of limitations. He also argued that applying amended versions of the statute of limitations against him would violate the constitutional prohibitions against ex post facto laws as well as the Indiana Constitution's guarantee of equal privileges and immunities. After a hearing, the trial court denied Swopshire's motion to

dismiss. The court certified its order for interlocutory appeal, which we accepted.[2]

Discussion and Decision

Standard of Review and Overview

[6] Swopshire's motion to dismiss challenged the constitutionality of statutory amendments to the limitations period for his alleged offenses. We review such arguments *de novo*. *See, e.g.*, *Tyson v. State*, 51 N.E.3d 88, 90-91 (Ind. 2016).

[7] Swopshire's arguments on appeal turn on the original statute of limitations that applied to the alleged offenses and two subsequent amendments to that limitations period. The State alleged that each of the five offenses occurred sometime between March 6, 2009, and March 2, 2011. At all times in that period, the original statute of limitations for sexual misconduct with a minor, both as a Class B felony and as a Class C felony, was five years from the date of the offense.[3] Ind. Code § 35-31-4-2(a)(1) (2006).

[8] However, effective July 1, 2013, the Indiana General Assembly revised the limitations periods for sex offenses committed against children. The 2013 amendment included expanding the statute of limitations for sexual misconduct with a minor, both as a Class B felony and as a Class C felony, to ten years

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[2] The trial court stayed further proceedings pending this appeal.

[3] The State's charges were based on a report from the victim. A different limitations period may have applied had the charges been premised on DNA evidence. *See* Ind. Code § 35-41-4-2(b) (2006).

from the date of the offense. I.C. § 35-31-4-2(m) (2013); *see also* I.C. § 11-8-8-4.5(a)(8) (2013). And, effective July 1, 2019, our legislature again amended the relevant limitations period. The 2019 amendment stated that, for any offense of sexual misconduct with a minor, prosecution "is barred unless commenced before the date that the alleged victim of the offense reaches thirty-one (31) years of age . . . ."[4] I.C. § 35-41-4-2(e)(5) (2019).

[9] On appeal, Swopshire argues that the original, five-year limitations period must apply to the alleged offenses because applying either of the amended limitations periods against him would violate the constitutional prohibitions against ex post facto laws. He further argues that applying the 2013 and 2019 amendments here would violate the Privileges and Immunities Clause of the Indiana Constitution. We address each argument in turn.

Issue One: Alleged Ex Post Facto Violations

[10] We first address Swopshire's argument that the original five-year limitations period applies to the State's charges and, as such, that the information was untimely. In particular, Swopshire initially asserts that the 2013 amendment cannot constitutionally be applied to him. Swopshire is not correct.

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[4] Swopshire's alleged victim turns thirty-one years of age in 2026.

[11] We have repeatedly held that extensions of statutes of limitation are applicable to crimes that have not expired at the time the extension takes effect. As we have thoroughly explained:

> Article I, § 10 of the United States Constitution prohibits the States from enacting laws with certain retroactive effects. *Stogner v. California*, 539 U.S. 607 (2003). Similarly, the Indiana Constitution provides, "'No ex post facto law . . . shall ever be passed.'" *Marley v. State*, 747 N.E.2d 1123, 1130 (Ind. 2001) (quoting Ind. Const. art. 1, § 24); *Culbertson v. State*, 792 N.E.2d 573, 578 (Ind. Ct. App. 2003), *trans. denied*. Our court has noted that the ex post facto analysis is the same under both the Indiana and federal constitutions.[5] *Culbertson*, 792 N.E.2d at 578; *Wiggins v. State*, 727 N.E.2d 1, 5 (Ind. Ct. App. 2000), *trans. denied* (citing *Spencer v. O'Connor*, 707 N.E.2d 1039, 1042 (Ind. Ct. App. 1999), *trans. denied*).
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> The ex post facto provisions prohibit States from enacting any law that imposes a punishment for an act that was not punishable at the time it was committed or that imposes additional punishment to that which was then prescribed. The focus of the ex post facto inquiry is not whether a legislative change produced a disadvantage for the defendant but, instead, whether such change altered the definition of criminal conduct or increased the penalty by which a crime is punishable.
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[5] The Indiana Supreme Court has since stated that, "[d]espite parallel language, we have recognized our State Constitution possesses a 'unique vitality.' Thus, although federal authority may assist in our analysis, we may find our Indiana provision dictates a different outcome." *Tyson*, 51 N.E.3d at 92 (citations omitted). However, Swopshire does not suggest that there is a difference between the state and federal provisions as applied to this appeal.

[The defendant] cites *Stogner v. California* to support his argument that [an extension of the statute of limitations for child molesting from five years to ten years] violates the prohibition against ex post facto laws. In *Stogner*, the United States Supreme Court reversed the defendant's sex-related child abuse conviction on the basis that an amendment to the California statutes of limitation violated the federal Ex Post Facto Clause by allowing the defendant to be prosecuted for an offense committed beyond the old limitation period. Our case is distinguishable.

In *Stogner*, the amended statute *revived* the defendant's previously time-barred prosecution. Here, the statute of limitation for [the defendant's] offenses had not yet run when the . . . amendment extended the time period for prosecution. Even the *Stogner* [C]ourt approved the amendment of a limitation period in this context. *See Stogner*, 539 U.S. at [618] (citing with approval decisions where courts upheld extensions of *unexpired* statutes of limitation).

Our appellate courts have repeatedly noted:

> Statutes of limitation pertain to the remedy and not to substantive civil rights. There can be no vested right in a remedy or mode of procedure. The accused in a criminal case cannot claim that the period prescribed by law in which a prosecution shall be begun shall remain the same as when the crime was committed. The period of limitation is granted in the grace of the sovereign and may be enlarged or contracted or altogether taken away . . . .

Streepy v. State, 202 Ind. 685, 687-88, 177 N.E. 897, 898 (1931) (citations omitted); *see also Wallace v. State*, 753 N.E.2d 568, 569 n.1 (Ind. 2001); *Greichunos v. State*, 457 N.E.2d 615, 616 (Ind. Ct. App. 1983). Accordingly, the extension of the limitation

> period . . . does not violate the state or federal Ex Post Facto Clauses.

Minton v. State, 802 N.E.2d 929, 933-35 (Ind. Ct. App. 2004) (emphases in original; footnote and some citations omitted), *trans. denied*. As the United States Court of Appeals for the Seventh Circuit has more succinctly stated, "it is well settled law that applying procedural statutes such [as an amendment that] enlarges the limitations period[] does not violate the [E]x [P]ost [F]acto [C]lause so long as the statute is passed before the given prosecution is barred." *United States v. Gibson*, 490 F.3d 604, 609 (7th Cir. 2007) (citing *Stogner*, 539 U.S. at 618).

[12] The earliest date alleged in the State's charges against Swopshire is March 6, 2009. The five-year limitations period for offenses on that date would have expired in March of 2014.[6] However, effective July 1, 2013, prior to the expiration of the State's ability to charge any of the offenses as alleged here, the General Assembly enacted the 2013 amendment, which expanded the limitations period to ten years. Accordingly, applying the 2013 amendment to the State's charges as alleged does not violate the federal or state Ex Post Facto

[6] For reasons that are not clear, before the trial court and in their briefs to this Court the parties have based their calculations of the limitations periods only on the last date of the timeframes stated in the charges.

Clauses, and the State had until March of 2019 under the 2013 amendment to file its charges.[7] *See id.*

[13] This brings us to Swopshire's alternative argument on appeal. In particular, here Swopshire argues that, even under the ten-year limitations period of the 2013 amendment, some of the dates alleged in Counts 1, 2, 3, and 5 had expired prior to the effective date of the 2019 amendment, which was July 1, 2019.[8] On this narrow point, we must agree with Swopshire.

[14] Just as it is "well established" that there is no ex post facto violation when an unexpired statute of limitations is extended, it is equally well established that the State cannot revive an expired offense by way of amending the statute of

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[7] Swopshire asserts that *Minton* is distinguishable because *Minton* involved charges of child molesting, while here the State has alleged sexual misconduct with a minor. We do not find Swopshire's purported distinction relevant or persuasive.

[8] The State asserts that Swopshire has failed to preserve this issue for our review. We cannot agree. In his motion to dismiss, Swopshire asserted that applying the 2019 amendment to him would violate the prohibitions against ex post facto laws, and he attached the 2019 amendment to his motion. Appellant's App. Vol II at 39-40. At the hearing on his motion, Swopshire focused his argument on the 2013 amendment, but he also stated as follows:

> In 2019, another amendment to the statute of limitation . . . added sexual misconduct with a minor to the 31-year list of sex offenses . . . . Our argument is that that doesn't matter. If the Court accepts our position that the 2013 amendment . . . violates ex post facto, then you don't even get to this 2019 amendment.

Tr. Vol. 2 at 5. We conclude that the arguments to the trial court sufficiently notified it of Swopshire's position that the 2019 amendment might apply to the State's allegations. *See, e.g.*, *Showalter v. Town of Thorntown*, 902 N.E.2d 338, 342 (Ind. Ct. App. 2009) ("The rule of waiver in part protects the integrity of the trial court; it cannot be found to have erred as to an issue or argument that it never had an opportunity to consider.") (quoting *GKC Ind. Theaters, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002)), *trans. denied*; *see also Gr. .J. v. Ind. Dep't of Child Servs. (In re D.J.)*, 68 N.E.3d 574, 580 (Ind. 2017) (repeating the "preference" of Indiana's appellate courts "for deciding cases on their merits"). And, in any event, "appellate courts are not prohibited from considering the constitutionality of a statute even though the issue otherwise has been waived." *Plank v. Cmty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 53-54 (Ind. 2013).

limitations. *See Stogner*, 539 U.S. at 613. As the Supreme Court of the United States has stated:

> After (but not before) the original statute of limitations had expired, a party such as [the defendant] was not "liable to any punishment." [The amended] statute therefore "aggravated" [the defendant's] alleged crime, or made it "greater than it was, when committed," in the sense that, and to the extent that, it "inflicted punishment" for past criminal conduct that (when the new law was enacted) did not trigger any such liability.

Id. In other words, once the statute of limitations for a crime has expired, the crime cannot be revived by an amendment to the statute of limitations.

[15] The State filed its charges in November of 2019. Counts 1, 2, 3, and 5 allege a range of dates that begins on March 6, 2009. Between March 6, 2019, and June 30, 2019, the ten-year limitations period of the 2013 amendment was in effect. As such, any offense of sexual misconduct with a minor committed by Swopshire between March 6, 2009, and June 30, 2009, had expired prior to the State filing its charges. However, beginning on July 1, 2019, the 2019 amendment took effect. The 2019 amendment then captured the stated range of dates in Counts 1, 2, 3, and 5 from July 1, 2009, forward.

[16] In sum, Counts 1, 2, 3, and 5 are premised in part on untimely and expired offenses when they state offense dates prior to July 1, 2009. We therefore reverse the trial court's denial of Swopshire's motion to dismiss in this narrow respect and remand with instructions for the court to limit the State's alleged

timeframes in Counts 1, 2, 3, and 5 to offenses occurring on or after July 1, 2009.

Issue Two: Privileges and Immunities

[17] Swopshire also asserts on appeal that applying the 2013 and the 2019 amendments against him violates the Privileges and Immunities Clause of Article 1, Section 23 of the Indiana Constitution.

> Article 1, Section 23 of the Indiana Constitution, provides, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." In reviewing an alleged violation of the Privileges and Immunities Clause, we employ the two-part test established by our supreme court in *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics that distinguish the unequally treated classes, and, second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. *Collins*, 644 N.E.2d at 80. . . .

Minton, 802 N.E.2d at 935 (footnote omitted).

[18] Swopshire contends that the 2013 and 2019 amendments violate that test as applied to him because the amendments unequally treat two similarly situated classes: those who are alleged to have committed offenses during the original five-year limitations period but would not have been captured by the 2013 and 2019 amendments, and those, like him, who are alleged to have committed offenses during the original five-year limitations period but were captured by the amendments. As Swopshire summarizes: "[t]he inherent characteristics of

these classes are identical but for the date their periods of limitation began to run." Appellant's Br. at 21. Of course, the date a period of limitations begins to run itself turns on the date of the alleged offense.

[19] Thus, Swopshire's argument is that the date of the alleged offense is irrelevant for determining which persons are similarly situated under Article 1, Section 23. Our case law has routinely rejected that argument where substantive criminal law has been at issue. As our Supreme Court has said, "'the time of a crime is selected as an act of free will by the offender.' The criminal, not the State, chooses which statute applies." *Rondon v. State*, 711 N.E.2d 506, 513 (Ind. 1999) (quoting *State v. Alcorn*, 638 N.E.2d 1242, 1245 (Ind. 1994)). We have added: "upon alteration of the criminal law, individuals who subsequently commit an offense are not similarly situated and cannot be equated to those who had previously committed an offense." *Whittaker v. State*, 33 N.E.3d 1063, 1067 (Ind. Ct. App. 2015).

[20] Swopshire notes that statutes of limitation are procedural law, not substantive law, and, as was the case here, they may be amended by the legislature after the commission of an offense, which in turn demonstrates that he could not have "cho[sen] which statute applies." *See* Appellant's Br. at 22. But we conclude that the reasoning from our substantive law applies to amendments to statutes of limitation: a person who is alleged to have committed an offense on a date that requires the application of one statute of limitations is not similarly situated to a person who is alleged to have committed the same offense but on a different date requiring the application of a different statute of limitations. The

dates of the alleged offenses make the two defendants "not similarly situated." *Whittaker*, 33 N.E.3d at 1067. We therefore affirm the trial court's denial of Swopshire's motion to dismiss under Article 1, Section 23.

Conclusion

[21] In sum, we affirm the trial court's denial of Swopshire's motion to dismiss in part. Specifically, we affirm the court's application of the 2013 amendment to the State's charges and, for the dates alleged in Counts 1, 2, 3, and 5 from July 1, 2009, forward, the application of the 2019 amendment. However, we reverse the trial court's denial of Swopshire's motion with respect to dates alleged prior to July 1, 2009, in Counts 1, 2, 3, and 5. In that limited respect, we remand with instructions for the trial court to permit the State to amend the information on Counts 1, 2, 3, and 5 to omit the dates prior to July 1, 2009, and to allege only the dates from July 1, 2009, forward. Further, we affirm the trial court's denial of the motion to dismiss under Article 1, Section 23, and we hold that a person who is alleged to have committed an offense on a date that requires the application of one statute of limitations is not similarly situated to a person who is alleged to have committed the same offense but on a different date under a different statute of limitations.

[22] Affirmed in part, reversed in part, and remanded with instructions.

Riley, J., and Brown, J., concur.