Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **28th day of January, 2022** are as follows:

PER CURIAM:

2021-K-00491 STATE OF LOUISIANA VS. JOSEPH B. SCHMIDT (Parish of St. Tammany)

AFFIRMED; SEE PER CURIAM.

SUPREME COURT OF LOUISIANA

No. 2021-K-00491

STATE OF LOUISIANA

VS.

JOSEPH B. SCHMIDT

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of St. Tammany

PER CURIAM:

We granted the State's application to determine, after reviewing the record, whether the State carried its heavy burden of showing that the two-year limitations period to commence trial on defendant's non-capital felony charges, La.C.Cr.P. art. 578(A)(2), was interrupted by defendant's failure "to appear at any proceeding pursuant to actual notice, proof of which appears in the record." La.C.Cr.P. art. 579(A)(3). After careful review, we find that the State failed to carry its burden of showing that the statute of limitations was tolled. Specifically, there is no proof in the record that defendant failed to appear at a proceeding in 1995 pursuant to actual notice. Accordingly, we agree with the court of appeal and the district court that this non-capital felony prosecution must be quashed because the State failed to timely commence the trial.

The State instituted this non-capital felony prosecution by bill of information on November 4, 1994. Thus, these charges are more than 25 years old and the State has not commenced the trial. Code of Criminal Procedure article 578 provides:

> A. Except as otherwise provided in this Chapter, no trial shall be commenced nor any bail obligation be enforceable:
>
> (1) In capital cases after three years from the date of institution of the prosecution;

(2) In other felony cases after two years from the date of institution of the prosecution; and

(3) In misdemeanor cases after one year from the date of institution of the prosecution.

B. The offense charged shall determine the applicable limitation.

This statute of limitations can be interrupted, however, as provided in Code of Criminal Procedure 579(A)(3), if "[t]he defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears in the record." Absent such an interruption, the statute of limitations ran out about 25 years ago.

Much of the discussion of the court of appeal was devoted to events that occurred after 1995, such as defendant's failure to appear in 2000 and his subsequent arrests in Texas in 2014 and 2019, and to questions of law pertinent to those events, such as the effect of 2013 La. Acts 6, which added Part C to La.C.Cr.P. art. 579. *See State v. Schmidt*, 2020-0145 (La. App. 1 Cir. 3/11/21) (unpub'd), available at 2021 WL 925566. However, upon close review of the record, it became clear that it is not necessary to consider events occurring after 1995 and related questions of law, but rather the record through 1995 is dispositive. The State all but acknowledges as much in the portion of its reply brief that addresses the proof of actual notice missing from this record. Nonetheless, the State proposes to remedy this absence of proof by supplementing the record at this late stage with modified minute entries it has constructed through an ex parte process, which alterations the lower courts did not review.

The record, which the court of appeal relied upon to conduct its review, shows that defendant was charged by bill of information on November 4, 1994. At the arraignment on November 28, 1994, trial was set for January 23, 1995. Trial did not occur on that date, for which there is no minute entry; there is only a partially completed subpoena form directed to the defendant but not signed by him. The form

states that pretrial conference was scheduled for February 21, 1995, and trial set for March 1, 1995.

A minute entry for March 1, 1995, indicates that the parties were absent on that date, and the matter was continued. There is no minute entry for February 21, 1995. There is another subpoena form with this date, which is directed to defendant but not signed by him. That form indicates that pretrial conference was scheduled for April 19, 1995, and trial set for May 1, 1995. According to the minute entry for May 1, 1995, the parties were again not present for trial. Two years from the date of institution of the prosecution then passed by 1997, at the latest, without the State commencing the trial.

Once the accused shows that the State has failed to bring him to trial within the time period specified by La.C.Cr.P. art. 578, the State bears a heavy burden of demonstrating that either an interruption or a suspension tolled the statute of limitations. *See, e.g., State v. Morris*, 1999-3235 (La. 2/18/00) (per curiam), 755 So.2d 205. As noted above, the State can meet this burden by showing that the statute of limitations was interrupted by defendant's failure "to appear at any proceeding pursuant to actual notice, *proof of which appears in the record.*" La.C.Cr.P. art. 579(A)(3) (emphasis added). The State here contends that the two-year period afforded by La.C.Cr.P. art. 578 was interrupted when defendant failed to appear in 1995.

However, the record contains no proof that defendant received actual notice of a proceeding in 1995 at which he failed to appear. The court of appeal ordered that the record be supplemented with all minute entries for proceedings between the start of the prosecution and November 1, 2000, and all summons, subpoenas, subpoena returns, and notices of hearing dates. Despite this, the record still lacks the necessary proof. Thus, the State fails to carry its heavy burden to show that the statute of limitations was tolled, pursuant to La.C.Cr.P. art. 579(A)(3).

In its reply brief filed in this court, the State alleges for the first time that it has discovered that the minute entries are not accurate, and the State further alleges that it has also found a missing minute entry. Therefore, the State filed a motion to supplement the record with "corrected" minute entries, which the State alleges more accurately reflect what occurred in these proceedings in 1995. However, it was incumbent upon the State to create a record in the trial court, which could then be reviewed by the appellate courts. The State's efforts to perfect a record come too late, and we deny the State's motion to supplement the record with these alterations.

Furthermore, even with the State's "corrected" minute entries, the record would remain unclear. In addition to accepting its proposed alterations to the record, the State asks this court to make a series of speculative leaps to infer that defendant failed to appear pursuant to actual notice. *See, e.g.,* Reply brief, p. 5 ("The record shows that there is no question that the defendant failed to appear despite receipt of actual notice, even if the precise date of the defendant's failure to appear cannot be pinpointed."). Thus, even if we granted the State's motion, the State would still fail to carry its burden of proof.

Defendant was charged with these non-capital felony offenses more than 25 years ago. The State failed to commence trial within the two years afforded by La.C.Cr.P. art. 578(A)(2). We are constrained by the record to find that the State failed to carry its heavy burden of showing that statute of limitations was tolled. Accordingly, we affirm the court of appeal's ruling, which found that the trial court did not abuse its discretion in granting defendant's motion to quash the bill of information for untimely prosecution.

AFFIRMED