

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EUGENE MOORE,

Defendant-Appellant.

UNPUBLISHED

May 24, 2002

No. 224021

Macomb Circuit Court

LC No. 99-001194-FC

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct involving penetration with a person under thirteen years of age, MCL 750.520b(1)(a), and second-degree criminal sexual conduct involving contact with a person under thirteen years of age, MCL 750.520c(1)(a). Defendant was sentenced to ten to twenty years' imprisonment for the first-degree criminal sexual conduct conviction and three to ten years' imprisonment for the second-degree criminal sexual conduct conviction,¹ with the sentences to be served concurrently with each other. We vacate defendant's convictions.

Defendant's first argument on appeal is that the trial court erred by denying defendant's motion to vacate the convictions based on the statute of limitations. We agree. Because there is no factual dispute in the present case, whether the prosecution is barred by the statute of limitations is a question of law that is reviewed de novo by this Court on appeal. *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673 (1996).

The statute of limitations at issue, MCL 767.24, provided:²

¹ Defendant was also charged with third-degree criminal sexual conduct, MCL 750.520d; however, the jury found him not guilty of that offense.

² We note that MCL 767.24 has recently been amended, effective April 2002, and now provides for no limitation period regarding prosecutions for first-degree criminal sexual conduct and a ten-year limitation period, or age twenty-one, whichever is later, for second-, third-, and fourth-degree criminal sexual conduct and assault with intent to commit criminal sexual conduct. 2002 PA 119. The amendment has no application in the present case.

(1) An indictment for the crime of murder may be found at any period after the death of the person alleged to have been murdered. Indictments for the crimes of kidnapping, extortion, assault with intent to commit murder, and conspiracy to commit murder shall be found and filed within 10 years after the commission of the offense. Except as otherwise provided in subsection (2), all other indictments shall be found and filed within 6 years after the commission of the offense. *However, any period during which the party charged did not usually and publicly reside within this state shall not be considered part of the time within which the respective indictments shall be found and filed.*

(2) Notwithstanding subsection (1), if an alleged victim was under 18 years of age at the time of the commission of the offense, an indictment for an offense under section 145c or 520b to 520g of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.145c and 750.520b to 750.520g of the Michigan Compiled Laws, may be *found and filed within 6 years after the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later.* [Emphasis added.]

The victim was born on October 5, 1977. Defendant, the victim's father, was charged with three counts of criminal sexual conduct pertaining to the victim. Count I, first-degree criminal sexual conduct, and Count II, second-degree criminal sexual conduct, both occurred when the victim was approximately eight or nine years old. Thus, these incidents would have occurred approximately around 1985 to 1986. On October 28, 1997, a preliminary examination was held regarding defendant's criminal sexual conduct charges, and defendant was bound over to stand trial. Therefore, by the time the first charges were brought in October 1997, the six-year statute of limitations had run; however, the victim's twenty-first birthday was not until October 5, 1998. Consequently, when the prosecution charged defendant with committing the two counts of criminal sexual conduct against the victim when she was under the age of thirteen, these charges were within the necessary statute of limitations period. However, these charges were subsequently dismissed on December 8, 1998, because the victim failed, for a second time, to appear for trial.

In March 1999, the prosecution re-authorized the dismissed charges against defendant. On April 27, 1999, a preliminary examination was held regarding these charges, and defendant was bound over to stand trial. On May 24, 1999, the prosecution filed a valid information setting forth these charges. However, these charges were filed after October 5, 1998, the victim's twenty-first birthday, and thus, the statute of limitations period had run.³

The primary goal of statutory interpretation is to give effect to the intent of the Legislature in enacting the statute. *People v Chavis*, 246 Mich App 741, 743; 635 NW2d 67 (2001). If a statute is clear and unambiguous, judicial construction or interpretation is

³ There is no dispute between the parties that the original prosecution was timely, and there is no dispute that the subsequent prosecution, regarding the crimes for which defendant was convicted, fell outside the limitation period. The dispute focuses solely on whether the original prosecution tolled the statute of limitations, thereby allowing the subsequent attempt to prosecute defendant.

unnecessary, and therefore, precluded. *Id.* MCL 767.24 only contains one tolling provision that states “any period during which the party charged did not usually and publicly reside within this state shall not be considered part of the time within which the respective indictments shall be found and filed.” However, there was no evidence presented that defendant at any time relevant lived outside the state of Michigan, nor does the prosecutor argue that the provision is applicable.

In *People v Dalton*, 91 Mich App 246, 248; 283 NW2d 710 (1979), an indictment alleged that the defendant had, on October 21, 1970, and on other dates through January 1, 1971, obtained funds over \$100 by false pretenses, and engaged in a violation of securities law. After the hearing, the district court quashed the indictment because the one-man grand jury had not taken any testimony, and the prosecution failed to comply with the discovery order issued by the trial court. *Id.* The order dismissing the indictment was filed February 3, 1977, and the prosecution filed a new complaint, warrant and information on February 22, 1977, after the statute of limitations had expired. *Id.* The defendant moved to quash the information on the ground that the statute of limitations had expired, however, the trial court denied the motion. *Id.*

This Court explained on appeal that, “[g]enerally, the return of an indictment or the filing of an information on which no valid conviction or judgment can be had will not, in the absence of a statute expressly so providing, operate to stop the running of the statute of limitations pending the return or filing of another indictment or information.” *Dalton, supra* at 251, quoting 21 Am Jur 2d, Criminal Law, § 163, pp 229-330. This Court further explained that protection from prosecution under a statute of limitations is a substantive right, not merely a procedural right, and such statutes should be liberally construed in favor of the accuser. *Dalton, supra* at 251-252, quoting 21 Am Jur 2d, Criminal Law, § § 154-155, pp 223-224. This Court concluded that “[s]ince Michigan has no statute specifically providing for tolling while the improper indictment was pending, the statute continued to run.” *Dalton, supra* at 252. Thus, this Court reversed and remanded to determine whether the defendant was ever absent from the state, which would toll the statute of limitations. *Id.* at 252-253. However, this Court stated that the defendant should be discharged if the defendant was not absent from the jurisdiction. *Id.* at 253.

This Court will toll the statute of limitations period if, as clearly stated in the tolling provision of MCL 767.24, a defendant has not usually and publicly resided in Michigan. *People v Budnick*, 197 Mich App 21-26, 27; 494 NW2d 778 (1992). However, there is no indication within the statute that, if an indictment/information has been filed but then is summarily dismissed, the statute of limitations period is tolled. The prosecution and the trial court agreed that because *Dalton, supra*, dealt with an improper indictment it was therefore distinguishable from the present case, which was dismissed because the victim failed to appear for trial. However, neither one of these scenarios are provided for by statute. The statute is clear and unambiguous, and unless defendant was not usually and publicly residing in Michigan during the statutory period of limitation, the statute was not tolled. MCL 767.24; *Chavis, supra* at 743. Thus, the trial court erred in failing to vacate defendant’s convictions because the statute had run on the criminal sexual conduct charges.⁴

⁴ As further support, we note that our Supreme Court in *People v Sierb*, 456 Mich 519, 531-532; 581 NW2d 219 (1998), quoting *People v Curtis*, 389 Mich 698, 706; 209 NW2d 243 (1973),
(continued...)

Given our resolution of defendant's first issue, it is not necessary to address defendant's sentencing issue.

Reversed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly

(...continued)

stated that “[a]s long as jeopardy has not attached, or the statute of limitations not run, our law permits a prosecutor to reinstate the original charge on the basis of obtaining a new indictment and thus beginning the process anew.” Here, the reinstatement of the original charges on which defendant was convicted were brought after the statute of limitations had run.