

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0516-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JERRY ROSADO,

Defendant-Appellant.

Submitted January 31, 2023 – Decided March 29, 2023

Before Judges Messano, Gilson and Gummer.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Cape May County, Complaint No. 2022-0076-0514.

Joseph E. Krakora, Public Defender, attorney for appellant (Eric R. Shenkus, Deputy Public Defender, of counsel and on the briefs).

Jeffrey H. Sutherland, Cape May County Prosecutor, attorney for respondent (Gretchen A. Pickering, Senior Assistant Prosecutor, on the brief).

The opinion of the court was delivered by

GILSON, J.A.D.

This appeal presents a novel question: does the January 3, 2002 amendment to the criminal statute of limitations, N.J.S.A. 2C:1-6, apply to and toll the five-year limitations period in effect in 1990, when defendant allegedly committed a sexual assault? We hold that the amendment does not apply because the statute of limitations governing defendant's alleged assault had expired in 1995, years before the 2002 amendment took effect. Moreover, if we were to construe the 2002 amendment to apply to defendant's criminal charge, it would violate the ex post facto clauses of both the federal and New Jersey constitutions. U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3.

On leave granted, defendant Jerry Rosado appeals from an August 29, 2022 order denying his motion to dismiss a criminal complaint charging him with second-degree sexual assault, N.J.S.A. 2C:14-2(c)(2). In the complaint the State alleged that the assault occurred in May 1990. The criminal statute of limitations in effect in May 1990 provided that a prosecution for a sexual assault had to be commenced "within five years after it is committed." N.J.S.A. 2C:1-6(b)(1) (1989). We, therefore, reverse the order denying defendant's motion and remand with direction that the trial court enter an order dismissing, with prejudice, the criminal complaint in this matter.

I.

On May 27, 1990, S.N. was found dead in Wildwood City.¹ Her body was found behind a restaurant in a supine position, with her pants, underwear, shirt, and bra partially removed.

The State Police collected DNA samples from S.N.'s body, including fingernail scrapings and vaginal smears and swabs. On May 29, 1990, those samples were submitted to the New Jersey State Crime Laboratory for analysis. The analysis indicated that the vaginal smears and fingernail scrapings contained an unknown DNA profile.

For more than thirty years, no one was charged with any crime related to S.N.'s death or sexual assault. Initially, the report of an autopsy of S.N.'s body performed on May 30, 1990, identified the manner of death as "[a]ccidental." In January 1996, however, S.N.'s death certificate was amended to change the manner of her death from accidental to "homicide." To date, neither defendant, nor anyone else, has been charged with S.N.'s murder.

Defendant was first identified as a person of interest in the suspected sexual assault of S.N. in August 2018, when the unknown DNA profile

¹ We use initials to protect the privacy interests of S.N.'s family. See R. 1:38-3(c)(12).

identified in May 1990 was submitted to a different laboratory to conduct a genetic genealogy analysis and search to help identify potential suspects. As a result of that analysis and search, defendant was identified as a person of interest.

Thereafter, the Cape May County Prosecutor's Office obtained a warrant to collect DNA from defendant. The warrant was executed on May 26, 2021, and the buccal swabs with defendant's DNA were submitted to the State Police DNA Laboratory in June 2021. That same month, the laboratory reported that defendant's DNA had a high statistical probability of matching the DNA recovered from S.N.'s body.

On April 8, 2022, defendant was charged in a complaint-warrant with one count of second-degree sexual assault. The complaint alleged that on or about May 26, 1990, in Wildwood City, defendant

committed sexual assault by committing an act of sexual penetration upon [S.N.], while [S.N.] was one whom the defendant knew or should have known was physically helpless or incapacitated, intellectually or mentally incapacitated or had a mental disease or defect, specifically by having sexual intercourse with the victim while she was physically incapacitated due to alcohol in violation of N.J.S.A. 2C:14-2(c)(2) (a crime of the second-degree).

In May 2022, defendant moved to dismiss the criminal complaint, contending that his prosecution for a crime committed on May 26, 1990, was time-barred by the statute of limitations. Defendant argued that the statute of limitations in effect in 1990 had expired on May 27, 1995, five years after the alleged assault.

In response, the State asserted that the prosecution against defendant was not time-barred because, effective January 3, 2002, N.J.S.A. 2C:1-6 had been amended. Under the 2002 amendment, the statute of limitations for prosecutions supported by DNA evidence does not begin to run until the State possesses both the physical evidence and the DNA or fingerprint evidence necessary to establish the identity of the "actor." According to the State, the 2002 amendment created a new statute-of-limitations period that was not triggered by the date of the offense; rather, the statute of limitations started to run on the date an actor was identified by means of comparison of DNA or fingerprint evidence to the physical evidence in the case. Consequently, the State argued that there was no ex post facto violation because the 2002 amendment did not revive a previously expired limitations period.

After hearing arguments on three separate days, the trial court denied defendant's motion in a written decision and order issued August 29, 2022. The

trial court reasoned that the statute of limitations did not begin to run until May 26, 2021, when detectives obtained buccal swabs from defendant. The court held that the 2002 amendment to the statute of limitations did not revive an expired prosecution and, therefore, did not violate the Ex Post Facto Clause of the federal Constitution. In that regard, the trial court stated: "One cannot revive what has not begun to live and, applying the DNA[-]tolling exception in N.J.S.A. 2C:1-6(c), the statute of limitations in this case did not begin to apply to the instant prosecution until May 26, 2021."

The trial court then stayed further proceedings pending defendant's anticipated motion for leave to appeal. Thereafter, we granted defendant leave to appeal the order denying his motion to dismiss the criminal complaint.

II.

On appeal, defendant argues that his prosecution for a 1990 sexual assault is a violation of his constitutional rights under the Ex Post Facto Clause. Specifically, defendant contends:

A. Prosecution for the offense charged is time[-] barred by the statute of limitations in effect at the time of the offense.

B. Amendments to a statute of limitations enacted after a previously applicable limitations period has expired violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution.

C. The trial court erred in reading an identity exception into the Ex Post Facto Clause where no such exception exists.

Generally, an appellate court uses an abuse-of-discretion standard to review a ruling on a motion to dismiss a criminal charge. State v. Twiggs, 233 N.J. 513, 532 (2018). When the dismissal hinges on a purely legal question, however, the review is de novo. Ibid. (citing State v. Cagno, 211 N.J. 488, 505-06 (2012)).

The ruling on defendant's motion involves two related legal questions. First, does the 2002 amendment to N.J.S.A 2C:1-6 apply to defendant's charge? Second, if it does, does that application violate defendant's constitutional rights under the Ex Post Facto Clause?

A. The Criminal Statute of Limitations.

"The statute of limitations in a criminal statute is a complete defense to the prosecution of the crime." State v. Thompson, 250 N.J. 556, 573 (2022). "A statute of limitations balances the right of the public to have persons who commit criminal offenses charged, tried, and sanctioned with the right of the defendant to a prompt prosecution." Ibid. (quoting State v. Diorio, 216 N.J. 598, 612 (2014)). Further, a statute of limitations is "designed to protect a defendant 'from being put to his defense after memories have faded, witnesses have died

or disappeared, and evidence has been lost.'" Ibid. (quoting State v. Jones, 445 N.J. Super. 555, 566 (App. Div. 2016) (quoting Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945))).

The statute of limitations for sexual assault is set forth in N.J.S.A. 2C:1-6. In 1990, the limitations period for sexual assault was five years. N.J.S.A. 2C:1-6(b)(1) (1989). In that regard, the statute read:

a. A prosecution for any offense set forth in N.J.S. 2C:11-3 or N.J.S. 2C:11-4 may be commenced at any time.

b. Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitations:

(1) A prosecution for a crime must be commenced within five years after it is committed;

. . . .

c. An offense is committed either when every element occurs or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

[N.J.S.A. 2C:1-6 (1989).]

Since 1990, N.J.S.A. 2C:1-6 has been amended several times. Two of those amendments are relevant to the determination of whether any of the amendments apply to defendant's criminal charge.

In 1996, the statute was amended to provide that a prosecution for a sexual assault "may be commenced at any time." L. 1996, c. 22, § 1. In other words, the Legislature decided to treat sexual assault like murder and eliminated the time limitation for bringing a prosecution for a sexual assault. Importantly for our statutory interpretation purposes, the 1996 amendment stated that it "shall take effect immediately and shall be applicable to all offenses not yet barred from prosecution under the statute of limitations as of the effective date." Id. § 2.

Effective January 3, 2002, the statute was amended again to carve out an exception for circumstances in which the prosecution includes DNA or fingerprint evidence. L. 2001, c. 308, § 1. Accordingly, the subsection explaining when an offense is committed was amended to provide:

Time starts to run on the day after the offense is committed, except that when the prosecution is supported by physical evidence that identifies the actor by means of DNA testing or fingerprint analysis, time does not start to run until the State is in possession of both the physical evidence and the DNA or fingerprint evidence necessary to establish the identification of the actor by means of comparison to the physical evidence.

[Ibid.]

That subsection has not been amended since 2002, and that is how the subsection read when defendant was charged in April 2022.

The State does not argue that the 1996 amendment to the criminal statute of limitations applies to defendant. The State effectively concedes that the elimination of the time limit for prosecuting a sexual assault made effective in 1996 does not apply to defendant's charge of sexual assault that allegedly took place on May 26, 1990. That concession is consistent with the plain language of the 1996 amendment, which stated that it was applicable to "offenses not yet barred from prosecution under the statute of limitations as of" May 1, 1996. L. 1996, c. 22, § 2.

Defendant allegedly committed the sexual assault on May 26, 1990. The five-year limitations period expired on May 27, 1995. Thus, the question becomes whether, in amending the criminal statute of limitations in 2002, the Legislature intended to create a new statutory-limitations period applicable to previously expired limitations periods. That question involves an interpretation of the 2002 amendment and an analysis of whether that amendment, if applied retroactively to expired limitations periods, would violate the Ex Post Facto Clause.

In construing statutes, our goal is to discern the Legislature's intent. Twiggs, 233 N.J. at 532. To determine the Legislature's intent, we start with the plain language of the statute. Ibid.; State v. S.B., 230 N.J. 62, 68 (2017). Statutory language is "generally[] the best indicator" of legislative intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005). Courts "can also draw inferences based on the statute's overall structure and composition." S.B., 230 N.J. at 68. Accordingly, courts "do not view [statutory] words and phrases in isolation but rather in their proper context and in relationship to other parts of [the] statute, so that meaning can be given to the whole of [the] enactment." State v. Rangel, 213 N.J. 500, 509 (2013).

A plain reading of the statute and its amendments establishes that the 2002 amendment does not apply to an expired statutory-limitations period. The 1996 amendment reveals that the Legislature clearly understood that amendments could be applied prospectively or retroactively. The 1996 amendment was applied prospectively "to all offenses not yet barred from prosecution" as of May 1, 1996. The 2002 amendment does not contain any language indicating that the Legislature intended to apply that amendment retroactively. Instead, in enacting the 2002 amendment, the Legislature stated that the amendment "shall take effect immediately." L. 2001, c. 308, § 2. Our Supreme Court has consistently

held that an amendment that is to take effect immediately is to be applied only prospectively. See State v. Lane, 251 N.J. 84, 96 (2022) ("[W]e have repeatedly construed language stating that a provision is to be effective immediately, or effective immediately on a given date, to signal prospective application."); State v. J.V., 242 N.J. 432, 444-45 (2020) (statute applies prospectively when the effective date is after the date of statute's enactment); Pisack v. B & C Towing, Inc., 240 N.J. 360, 370 (2020) (amendatory legislation stating it "take[s] effect immediately" becomes effective on the day it is signed into law).

B. The Ex Post Facto Clauses.

Our interpretations of N.J.S.A. 2C:1-6 and its amendments are reinforced by constitutional principles. It is well-settled that a statute should generally be construed to avoid a constitutional violation. State v. Carter, 247 N.J. 488, 520 (2021); State v. Burkert, 231 N.J. 257, 276-77 (2017). If the 2002 amendment to the criminal statute of limitations were interpreted to apply as the State argues, that application to defendant's charge would violate his constitutional ex post facto rights.

A statute of limitations in a criminal case creates an "absolute bar" to prosecution. Twiggs, 233 N.J. at 534 (quoting State v. Short, 131 N.J. 47, 55 (1993)). The State bears the burden of proving that the offense was committed

within the prescribed limitations period. See Cagno, 211 N.J. at 506-07. In other words, although the Legislature does not have to enact a statute of limitations, once it does, it has conferred a substantive right to potential defendants. See Stogner v. California, 539 U.S. 607, 610 (2003). Accordingly, the ex post facto clauses of the federal Constitution prohibit the federal government and states from enacting laws with certain retroactive effects. Ibid. (citing U.S. Const. art. I, § 9, cl. 3; id. § 10, cl. 1). The federal ex post facto clauses prevent the time for prosecution to be extended in any case where the pre-existing limitations period has already expired. Ibid. Accordingly, so does the ex post facto clause of the New Jersey Constitution. See State v. Perez, 220 N.J. 423, 439 (2015) (noting "New Jersey's ex post facto jurisprudence follows the federal jurisprudence").

Defendant allegedly committed the sexual assault on May 26, 1990. As already noted, there was a five-year limitations period applicable to that crime. The limitations period expired on May 27, 1995. Consequently, the 2002 amendment to the criminal statute of limitations could not revive that expired prosecution. See State v. E.W., 413 N.J. Super. 70, 75-76 (App. Div. 2010) (explaining that a charge of sexual assault cannot be revived after it has expired by a subsequent amendment to the statute of limitations).

The State argues that the 2002 amendment is not reviving an expired limitations period. Instead, the State contends that the 2002 amendment "tolled" the running of the statute of limitations. The obvious problem with that contention is that one cannot toll something that has already expired. In that regard, the trial court reasoned: "One cannot revive what has not begun to live and, applying the DNA[-]tolling exception in N.J.S.A. 2C:1-6(c), the statute of limitations in this case did not begin to apply to the instant prosecution until May 26, 2021." We disagree. We submit that the correct analysis is to hold that the 2002 DNA-tolling exception in N.J.S.A. 2C:1-6(c) cannot be applied to a statutory-limitations period that has already expired. To do otherwise in this case would be to revive a prosecution that could not be brought after May 27, 1995.

A simple example illustrates this point. No one can dispute that if defendant had been charged in 1997 with the sexual assault, that charge would have been dismissed with prejudice as time-barred under the criminal statute of limitations then in effect. Therefore, a 2002 amendment to the same statute cannot constitutionally revive what has already expired.

In reaching its holding, the trial court relied on two New Jersey Supreme Court cases: Thompson and Twiggs. Neither of those cases are applicable to

the question of whether the 2002 amendment revived the limitations period against defendant. In Twiggs, the Court considered the meaning of the phrase "identifies the actor" in the 2002 amendment to N.J.S.A. 2C:1-6(c). 233 N.J. at 520. Looking at the plain language of the statute and the policy underlying the criminal statute of limitations, the Court concluded "that the DNA-tolling exception applies only when the State obtains DNA evidence that directly matches the defendant to physical evidence of a crime." Id. at 521.

In Thompson, the Court held that "a plain reading of N.J.S.A. 2C:1-6(c) requires the statute of limitations in cases involving DNA evidence to begin when the State possesses the physical evidence from the crime as well as the DNA sample from the defendant, not when a match is confirmed." 250 N.J. at 575. In neither Thompson nor Twiggs, was the Court asked to decide if the language in subsection (c) of N.J.S.A. 2C:1-6 tolls the running of a statute of limitations on a previously expired limitations period.

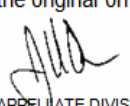
We recognize the strong and legitimate desire to ensure that crimes are appropriately punished. As we have explained, however, criminal statutes of limitations involve a legislative judgment of how to "balance[] the right of the public to have persons who commit criminal offenses charged, tried, and sanctioned with the right of the defendant to a prompt prosecution." Id. at 573

(quoting Diorio, 216 N.J. at 612). In 1990, the Legislature had balanced the public right against the rights of potential suspects and concluded that the appropriate statute of limitations for sexual assault was five years. That statute created a substantive defense and when the five-year period expired, the federal and New Jersey constitutions prohibited a retroactive revival of prosecution. See Stogner, 539 U.S. at 632-33; Perez, 220 N.J. at 439. Therefore, we are bound to apply the law and the federal and New Jersey constitutions.

In summary, we hold that the DNA-tolling exception in N.J.S.A. 2C:1-6(c) was not intended to and does not apply to a statutory-limitations period that had already expired. Therefore, this matter is remanded with direction that the trial court enter an order granting defendant's motion and dismissing, with prejudice, the criminal charge in this matter.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION