

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
August 21, 2012 Session

**STATE OF TENNESSEE v. CARL E. PRESLEY**

**Appeal from the Criminal Court for Monroe County**  
**Nos. 10-286, 11-178      Carroll L. Ross, Judge**

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**No. E2011-02526-CCA-R10-CD - Filed September 27, 2012**

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In this State appeal, the State argues that the trial court abused its discretion when it dismissed a misdemeanor vandalism charge against the defendant, Carl E. Presley, and also ruled that it could not charge the jury on the lesser-included offense of misdemeanor vandalism on the two remaining felony vandalism charges. After review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the Court, in which JOSEPH M. TIPTON, P.J., and JEFFREY S. BIVINS, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Robert S. Bebb, District Attorney General; and Steven Morgan, Assistant District Attorney General, for the appellant, State of Tennessee.

Robert L. Jolley, Jr., Knoxville, Tennessee, for the appellee, Carl E. Presley.

**OPINION**

**FACTS**

From the record before us, it appears that the defendant and his neighbor, Gary Frye, have been in a longstanding property dispute concerning an easement that has developed into an acrimonious relationship between the parties. See Gary W. Frye, et al. v. Carl Presley, et al., No. E2007-00510-COA-R3-CV, 2008 WL 2557372 (Tenn. Ct. App. June 27, 2008). On October 5, 2009, Frye filed an affidavit of complaint alleging that, on September 22, 2009, the defendant tore down his property line fence and thus committed vandalism in

the amount of \$400. On October 6, 2009, Frye filed an affidavit of complaint alleging that the defendant assaulted him on October 1, 2009. Evidently, both of the criminal summons were dismissed without prejudice. Thereafter, on November 18, 2009, Frye filed two other affidavits of complaint, essentially alleging the same offenses – that the defendant assaulted him on October 1, 2009, and that the defendant committed vandalism on September 22, 2009, by tearing down Frye’s property line fence, except that the amount of damage from the vandalism was alleged to be \$698. On March 2, 2010, it appears that the defendant entered a plea of not guilty on the assault charge, and the vandalism charge was dismissed. Frye filed another affidavit of complaint on April 22, 2010, alleging that the defendant assaulted him that day. The charge was dismissed on May 18, 2010.

On August 4, 2010, the Monroe County Grand Jury returned a five-count indictment against the defendant, in case number 10-286, charging him with two counts of assault, two counts of felony vandalism, and one count of misdemeanor vandalism, with all of the charges listing Frye as the victim except for the misdemeanor vandalism which listed James Bohannon as the victim. With regard to the charges pertinent in this appeal, one of the felony vandalism counts, Count 3, alleged that, on September 22, 2009, the defendant destroyed the property line fence on the north edge of Frye’s property, causing damage in an amount greater than \$500 but less than \$1,000. The misdemeanor vandalism count, Count 4, alleged that, on some date in September 2009, the defendant removed boundary monuments or survey markers valued in an amount less than \$500 from the property of James Bohannon. The other felony vandalism count, Count 5, alleged that, on some date in March 2010, the defendant destroyed, polluted, or contaminated Frye’s property, causing damage in an amount greater than \$500 but less than \$1,000.

On November 9, 2010, the defendant filed a motion to dismiss the indictment, arguing that, because three counts of the indictment had previously been dismissed, “the information presented prejudiced the jury and their consideration of all the counts of th[e] indictment.” On that same day, he also filed a motion to dismiss Counts 1 and 3 of the indictment and a motion to dismiss Count 2 of the indictment, arguing that the charges were previously dismissed on March 2, 2010 and May 18, 2010, respectively. On February 14, 2011, the trial court dismissed Count 2 of the indictment, noting that the case was previously tried in general sessions court and that jeopardy had attached.

On April 6, 2011, the Monroe County Grand Jury issued an indictment in case number 11-178, charging the defendant with three counts of vandalism, two felony and one misdemeanor, exactly as in the indictment in case number 10-286 except all counts listed Gary Frye as the victim.

On April 18, 2011, the trial court entered an order dismissing case number 10-286 without prejudice upon the State's motion "to dismiss this cause due to deficiencies in the indictment[.]" In judgment sheets filed that same day, the court indicated that the charges in the first indictment were dismissed and that the grand jury had issued a superseding indictment.

On May 2, 2011, the defendant filed a motion to dismiss the misdemeanor vandalism charge in Count 2 of the new indictment on the ground that it was filed outside the one-year statute of limitations. On August 15, 2011, the State responded that the charge was not time-barred because the defendant had previously been indicted for the same offense within the limitations period and that the superseding indictment merely corrected a clerical error in the first indictment of the wrong victim's name.

The parties presented arguments in accordance with their respective motions at a hearing conducted on August 15, 2011. At the hearing, defense counsel acknowledged that the defendant had previously been indicted on the same charge but pointed out that the prior indictment did not list the correct owner of the property the defendant was accused of vandalizing. Defense counsel asserted that the name of the victim was a necessary element of the vandalism charge and, as such, the new indictment was not a superseding indictment and did not qualify for tolling of the statute of limitations from the first indictment. After the hearing, the trial court entered a judgment dismissing Count 2 of the indictment, charging the defendant with misdemeanor vandalism, after finding that the indictment was filed outside the statute of limitations. The court noted that the "[a]llegation in indictment does not include basis for State's argument that this is a superseding indictment and the action is tolled" and that the "[p]rior allegation does not allege correct ownership of property and thus is different than this indictment."

On August 22, 2011, the State filed a motion to reconsider the dismissal, arguing that the superseding indictment corrected a clerical error in the original indictment and indicating that, as required, the superseding indictment was issued while the original indictment was still pending. The court denied the State's motion to reconsider. The State then filed a Rule 3 notice of appeal regarding the dismissal of Count 2.

At a hearing on September 19, 2011, the State questioned whether, in light of the trial court's determination regarding Count 2, the jury could return a verdict for the lesser-included offense of misdemeanor vandalism on the remaining felony vandalism counts. The court ruled that the statute of limitations would bar the jury from convicting the defendant of a misdemeanor in the remaining counts. With regard to that ruling, the State filed an application for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, which the trial court denied. Thereafter, the State filed an application

for an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure regarding both the dismissal of Count 2 and the ruling on the other counts concerning lesser-included offenses. The State also filed a motion to voluntarily dismiss the original Rule 3 appeal concerning the dismissal of Count 2. This court granted the State's motion for extraordinary appeal and also dismissed the pending Rule 3 appeal.

### ANALYSIS

On appeal, the State argues that the trial court abused its discretion when it dismissed the misdemeanor vandalism charge in the second indictment as being filed outside the statute of limitations and also when it ruled that it could not charge the jury on the lesser-included offense of misdemeanor vandalism on the two remaining felony vandalism charges.

A prosecution is commenced by, among other things, finding an indictment or presentment. Tenn. Code Ann. § 40-2-104. Aside from certain exceptions not applicable to this case, "all prosecutions for misdemeanors shall be commenced within the twelve (12) months after the offense has been committed[.]" Id. § 40-2-102(a). "Commencement of the prosecution tolls the running of the limitations period because such commencement initially notifies the defendant of the charge or charges to be defended." State v. Tait, 114 S.W.3d 518, 522 (Tenn. 2003).

In State v. Harris, 33 S.W.3d 767, 771 (Tenn. 2000), the Tennessee Supreme Court explained the State's authority to obtain a superseding indictment as follows:

The power to seek a superseding indictment lies within [the] broad discretion of the State. A superseding indictment is an indictment obtained without the dismissal of the prior indictment. . . . Where there has been no jeopardy on the first indictment, a grand jury may return a new indictment against an accused even though another indictment is pending. . . . [A] legitimate decision to bring a superseding indictment is uniquely within the State's authority. Thus, the State may obtain a superseding indictment at any time prior to trial without dismissing the pending indictment and may then select the indictment under which to proceed at trial.

Id. (citations and footnote omitted).

A superseding indictment filed beyond the statute of limitations is proper so long as the first indictment was pending and the charges are neither broadened nor substantially amended. State v. Lawson, 291 S.W.3d 864, 872 (Tenn. 2009); see also State v. Nielsen, 44 S.W.3d 496, 500 (Tenn. 2001). "If the allegations and charges are substantially the

same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him.” Nielsen, 44 S.W.3d at 500 (quoting United States v. Italiano, 894 F.2d 1280, 1283 (11th Cir. 1990)). Further, when a prosecution is timely commenced, there is no requirement that an indictment issued after the statute of limitations has passed must allege facts showing that the statute of limitations was tolled. Id. at 499.

Again, as relevant here, the defendant was charged in Count 4 of the original indictment on August 4, 2010 of the misdemeanor vandalism of property belonging to James Bohannon on some date in September 2009. This indictment was issued within the one-year statute of limitations for a misdemeanor offense. While that indictment was still pending, a second indictment was issued on April 6, 2011, in which the defendant was charged in Count 2 of the misdemeanor vandalism of property belonging to Gary Frye on some date in September 2009. The second indictment was issued outside the applicable statute of limitations. Thus, the question before this court is whether the second indictment alleged a new offense or broadened or substantially amended the charge against the defendant such that it did not properly qualify as a superseding indictment and therefore considered as having been issued within the statute of limitations period.

We conclude that, limited to the facts of this case, the second indictment did in fact substantially amend the charge of misdemeanor vandalism against the defendant such that the statute of limitations was not tolled. The statute prohibiting vandalism provides, “Any person who knowingly causes damage to or the destruction of any real or personal property of another . . . knowing that the person does not have the owner’s effective consent is guilty of an offense under this section.” Tenn. Code Ann. § 39-14-408(a). Tennessee Code Annotated section 40-13-209(b), which addresses the form and sufficiency of an indictment alleging property ownership, states that “[i]t is sufficient to describe property in any manner which may sufficiently identify the property, upon or in relation to which the offense charged was committed.”

Under the first indictment, the defendant was on notice that he had to defend against the charge of vandalizing property belonging to James Bohannon, but under the second indictment he had to defend against the charge of vandalizing property belonging to Gary Frye. The property owner’s name was the primary identifier by which the defendant was apprised of the charge he had to defend against. However, the property owner/victim listed in the second indictment was more than just a minor change of the primary identifier, unlike the situations in State v. Hensley, 656 S.W.2d 410 (Tenn. Crim. App. 1983) and State v. McClennon, 669 S.W.2d 705 (Tenn. Crim. App. 1984). In Hensley, only one of the three victims’ names was amended, and it was simply amended to Paul L. Walker from Paul Wolfenbarger. Hensley, 656 S.W.2d at 413. In McClennon, the State was allowed to amend the indictment to allege that the owner of the stolen property was “Voyager Enterprises,

d/b/a Joe Scott Farm Equipment Co.” instead of “Joe Scott, d/b/a Joe Scott Farm Equipment Co.”; thus, the operating name of the victimized company was unchanged. McClennon, 669 S.W.2d at 706. Moreover, unlike the situation in State v. Clark, 2 S.W.3d 233, 234-35 (Tenn. Crim. App. 1998), in which a panel of this court held that the identity of the victim was not an essential element of aggravated robbery and that the charging instrument was not defective for failing to identify the victim, the indictment in this case listed an entire month period in which the offense occurred, instead of listing an exact date which would have considerably aided in a defendant’s identification of the offense he was being called to defend against. In sum, we cannot conclude that the allegations and charges were substantially the same in the old and new indictments, such that we can assume the defendant was placed on notice of the charge against him. See Nielsen, 44 S.W.3d at 500. Therefore, we affirm the trial court’s dismissal of Count 2 of the indictment as being barred by the statute of limitations.

As to the State’s second assertion that the trial court abused its discretion in finding that it could not charge the jury on the lesser-included offense of misdemeanor vandalism on the two remaining felony vandalism charges, it is our view that our supreme court answered the question in Lawson, 291 S.W.3d at 867 n.3, when it noted:

A defendant who is both indicted for a felony that includes a misdemeanor and subsequently acquitted of the felony but convicted of the misdemeanor is entitled to a discharge if the offense was committed more than one year before the initial indictment. Hickey v. State, 131 Tenn. 112, 174 S.W. 269 (1915); Turley v. State, 50 Tenn. (3 Heisk.) 11, 13 (1870); see also Smith v. State, 205 Tenn. 502, 327 S.W.2d 308, 326 (1959) (finding no error when the trial court refused to instruct the jury on lesser-included offenses that were barred by the statute of limitations).

Id.; see also State v. Robert Jason Burdick, No. M2010-00144-CCA-R3-CD, 2011 WL 6020569, at \*3 (Tenn. Crim. App. Dec. 2, 2011), perm. app. granted (Tenn. Apr. 11, 2012) (stating, “An accused who is tried for a felony, which is not barred by the statute of limitations, may not be convicted of a lesser included offense which is barred.”). Thus, if the trial court was correct in its finding that a conviction for misdemeanor vandalism was barred by the statute of limitations, as we have concluded it was, then the court did not err in its finding that the jury should not be charged on misdemeanor vandalism as a lesser-included offense of felony vandalism.

## **CONCLUSION**

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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ALAN E. GLENN, JUDGE