ORIGINAL

20050329

IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

State of North Dakota

Appellee,

v.

Lyle J. Noorlun

Appellant.

Appeal from the District Court
East Central Judicial District
Cass County, North Dakota
The Honorable Norman Backes

SUPREME COURT NO. 20040329
CASS COUNTY NO. 03-K-04290

****

PETITION FOR REHEARING

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1. TABLE OF CONTENTS

PARAGRAPH NO.

2. TABLE OF AUTHORITIES:

CASES: **PARAGRAPH NO.**

NORTH DAKOTA CASES:

NORTH DAKOTA CENTURY CODE:

OTHER AUTHORITIES:

3. LAW AND ARGUMENT

4. Noorlun argued in his Fifth issue that his counsel was ineffective because he did not move to quash the Information. The reason was that the Information was defective when filed on December 17, 2003 and should have been objected to by his counsel after the preliminary examination on March 25, 2004 and prior to the entry of any plea.

5. On its face, Noolun's counsel failed to quash the Information which was beyond the statute of limitations on six counts (Counts 1, 4, and 7 were alleged to have occurred on or about December 18, 1998 and Counts 2, 5, and 8 were alleged to have occurred on March 13, 1999).

6. On direct appeal, this Court rejected such a claim of ineffective assistance of counsel on its face and affirmed the judgment without prejudice to allow Noorlun to pursue an ineffective assistance of counsel claim at a post-conviction proceeding. *State v. Noorlun*, 2005 ND 189, ¶ 31. This Court rejected the claim on its face because of N.D.C.C. § 29-04-04 (time of defendant's absence from the State is not counted as part of the limitation period), and that, "there is some evidence Noorlun was not in North Dakota for significant periods of time between the dates of the notes and the filing of the information on December 17, 2003." *Noorlun* at ¶ 31. This was based upon the State's argument that N.D.C.C. ¶ 29-04-04 should apply and the State's argument that Noorlun was absent from the State, at best pointing to some indications of Noorlun residing in California or Nevada without any concrete evidence.

7. N.D.C.C. § 10-04-18 states, "[A]n information must be filed or an indictment must be found under this chapter within five years after the alleged violation." However, the section is silent regarding the tolling of the statute of limitations. N.D.C.C. § 29-04-04 is a general tolling statute which has application to the statute of limitation periods provided in N.D.C.C.

Chapter 29-04. But this statute should not apply to a more specific securities violation out of Chapter 10.

8. As this Court has stated that "section 12.1-02-02(2) is only applicable to Title 12.1, and the willful culpability level will not be read into other chapters unless the legislature specifically states as such," *State v. Glass*, 2000 ND 212, 620 N.W.2d 146, ¶ 17, this Court should likewise decline an invitation to read N.D.C.C. § 29-04-04 into other chapters. Moreover, and as in *Glass supra*, the State offers no evidence that the legislature intended for N.D.C.C. § 29-04-04 to apply to a securities violation in Chapter 10. Based upon this, there should be ineffective assistance of counsel on its face.

9. Secondly, and although a matter of first impression for this Court, the State should have the burden to prove beyond a reasonable doubt that the statute of limitation has not run. See *State v. Pierce*, 782 P.2d 194 (Utah1989)(holding that the state's applicable burden of proof for establishing that the statute has not run is beyond a reasonable doubt), *citing State v. Taylor*, 21 Or.App. 119, 533 P.2d 822, 823 (1975)(prosecution must prove that an unlawful act occurred within the period of the statute of limitations) and *Parnell v. Superior Court*, 119 Cal.App.3d 392, 173 Cal.Rptr. 906, 914 (1981)("[b]ecause the statute of limitations is jurisdictional, the People have the burden of supporting an information with some evidence that the prosecution is not barred by limitations.") *Also see United States v. Owens*, 965 F.Supp. 158, 162-63 (D.Mass.1997)(government bears burden of proof "beyond a reasonable doubt just like any other element of the case" on whether statute of limitation was tolled by defendant's "fleeing from justice."); Paul H. Robinson, Criminal Law Defenses § 202(a), at 464 (1984)("The burden of persuasion is nearly always on the state, beyond a reasonable doubt."). Lastly, the American Law Institute's (ALI) Model Penal Code (MPC) treats

jurisdiction and limitation issues as elements of an offense that must be proved beyond a reasonable doubt. MPC §§ 1.12(1), 1.13(9)(d), (e) (1985).

10. As this Court has also stated, "[T]he statute of limitations in a criminal case is a jurisdictional fact which creates a bar to prosecution." *State v. Hersch*, 445 N.W.2d 626 (N.D.1989). "[S]tatutes of limitation are to be construed liberally in favor of the accused and against the prosecution." *Id.* In this case, the record does not prove beyond a reasonable doubt that Noorlun was absent from the State to toll the statute of limitation. Based upon this, there should be ineffective assistance of counsel on its face.

11. CONCLUSION AND PRAYER FOR RELIEF.

12. WHEREFORE, based upon the foregoing, the Appellant, Lyle J. Noorlun, respectfully prays for this Court to reverse the convictions on the six counts in violation of the statute of limitations, or in the alternative, to grant whatever relief this Court deems appropriate.

Dated this 12th day of December, 2005.

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13. CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on this 12th day of December, 2005, upon:

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