

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff-Appellee,)
)
 vs.) SUPREME COURT NO. 20070306
)
 Ned William Nastrom,)
)
 Defendant-Appellant.)

APPELLANT'S BRIEF

APPEAL FROM THE SEPTEMBER 17, 2007 CRIMINAL JUDGMENT
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA
THE HONORABLE JOHN C. IRBY PRESIDING

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STATEMENT OF THE ISSUE PRESENTED

- I. Whether the statute of limitations bars the prosecution of Willful Failure to Pay Child Support where the child turned eighteen on February 17, 2000 and where the Information was not filed until February 9, 2007?

STATEMENT OF THE CASE

Defendant-Appellant Ned William Nastrom appeals from his judgment and conviction of Willful Failure to Pay Child Support. Defendant seeks reversal on the grounds that the statute of limitations bars prosecution.

On February 9, 2007, an Information was filed, charging Defendant with Willful Failure to Pay Child Support, a class C Felony, in violation of N.D.C.C. § 12.1-37-01. (A-3)¹ Subsequently, on May 17, 2007, Defendant filed a Motion to Dismiss, arguing the statute of limitations barred prosecution since the child was emancipated on February 17, 1999. (Motion to Dismiss, docket sheet No. 14)

On June 6, 2007, a hearing was held before Judge John C. Irby on the Motion to Dismiss. Thereafter, on July 3, 2007, an Order denying the Motion to Dismiss was filed. (A-5). On September 13, 2007, an Amended Order was filed. The Amended Order was intended to supplement the previous Order. (A-6) Judge Irby denied the Motion to Dismiss "[b]ecause there were numerous valid Orders to pay arrearages, and because arrearages are considered the same as a child support obligation, the criminal Information was filed within the

¹ Appendix

appropriate 3 year time limit for filing a charge of felony Willful Failure to Pay Child Support." (A-8)

On September 17, 2007, Defendant entered a Conditional Plea of guilty, reserving the right to appeal and seek review of the Order and Amended Order. (A-9) After the acceptance of the Conditional Plea, Judge Irby sentenced Defendant to a deferred imposition of sentence for a period of two years. The sentence included two years of supervised probation and payment of \$1,500.00 in restitution. (A-11) The execution of the sentence and probation were stayed pending appeal. (A-9) (ST 6)²

Thereafter, on October 15, 2007, Defendant filed his Notice of Appeal, appealing his judgment of conviction. (A-17)

STATEMENT OF THE FACTS

The essential facts are not in dispute. No testimony or evidence were presented at the Motion to Dismiss hearing. The court relied upon the previously filed Affidavit of Probable Cause and the State's Response to Defendant's Motion to Dismiss attachments.

On June 1, 1983, pursuant to a Burleigh County District Court Judgment, Defendant was adjudged the father of S.M.S., born February 17, 1982. Defendant was ordered to pay \$150.00 in child support per month "until the child reaches the age of eighteen (18) or is otherwise emancipated." (Affidavit of

Probable Cause, docket No. 2, p. 2; State's Response to Defendant's Motion to Dismiss, docket No. 18, p. 6)

Judge Irby found the child was emancipated on February 17, 1999. (A-7) However, there is no evidence in the record to support this. Defense counsel represented to the court that the child was emancipated on February 17, 1999. (T 5)³ Assistant State's Attorney Reid Brady indicated that "I don't know if the State would agree with the emancipation date but I don't know that that's critical to this issue here." (T 6) Nevertheless, on February 17, 2000, S.M.S. turned eighteen years of age.

On December 11, 2003, a Cass County Order was filed, ordering Defendant to pay \$200 per month towards the child support arrearage. (State's Response to Defendant's Motion to Dismiss, docket No. 18, p. 8) Subsequently, between April 15, 2004 and July 18, 2006, two additional Orders and four Warrant of Commitments were filed against Defendant. (State's Response to Defendant's Motion to Dismiss, docket No. 18, p. 9-14)

On February 9, 2007, approximately seven years after the child turned eighteen, the State filed an Information, charging Defendant with Willful Failure to Pay Child Support. (A-3). As of February 5, 2007, Defendant's child support arrearage was \$27,026.27. (Affidavit of Probable Cause, docket No. 2, p. 2)

³ June 6, 2007 Motion to Dismiss hearing transcript

ARGUMENT

I. The statute of limitations bars the prosecution of Willful Failure to Pay Child Support where the child turned eighteen on February 17, 2000 and where the Information was not filed until February 9, 2007.

The general rule is that prosecution for a felony other than murder must be commenced within three years after its commission. N.D.C.C. § 29-04-02. N.C.C.C. § 29-04-02 provides:

"Except as otherwise provided by law, a prosecution for any felony other than murder must be commenced within three years after its commission. Nothing in this section prevents a person prosecuted for murder from being guilty of any included offense and punished accordingly."

Expiration of the statute of limitations bars prosecution of a criminal charge. State v. Hersch, 445 N.W.2d 626, 629 (N.D. 1989).

The issue is whether Judge Irby correctly interpreted and applied the statute of limitations statute. Statutory interpretation is a question of law fully reviewable on appeal. Ralston v. Ralston, 2003 ND 160, ¶ 5, 670 N.W.2d 334. This Court's "primary objective is to ascertain legislative intent, which must be sought initially from the language of the statute." Id. at ¶ 5. In interpreting a statute, words are to be understood in their ordinary meaning. N.D.C.C. § 1-02-02, Id. at ¶ 5. "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing

its spirit." N.D.C.C. § 1-02-05, Id. at ¶ 5.

Here, the statute is clear and free of ambiguity. Unless the legislature mandates an exception to the general rule, the prosecution for all felonies except murder must be commenced within three years after its commission.

Defendant was charged with Willful Failure to Pay Child Support in violation of N.D.C.C. § 12.1-37-01. N.D.C.C. § 12.1-37-01(1) provides:

"A person is guilty of an offense if the person willfully fails to pay child support in an amount ordered by a court or other governmental agency having authority to issue the orders."

The offense is a class C felony "[i]f the unpaid amount is greater than the greater of two thousand dollars or six times the monthly child support obligation." N.D.C.C. § 12.1-37-01(2)(a). N.D.C.C. § 12.1-37-01(5) provides "[f]or purposes of this section, 'child support' has the meaning provided in section 14-09-09.10." N.D.C.C. § 14-09-09.10(3) provides:

"'Child support' means payments for the support of children, including payments for health insurance coverage or other medical support, and combined payments for the support of children and spouses or former spouses, however denominated, if the payment is required by the order of a court or other governmental agency having authority to issue such orders."

Judge Irby ruled that for purposes of N.D.C.C. § 12.1-37-01 child support arrearage is the same as child support. Judge Irby reasoned:

"Child support is defined as 'payments for the support of children . . . if the payment is required

by the order of a court or other governmental agency having authority to issue such orders.' N.D. Cent. Code § 14-09-09.10(3). See also N.D. Cent. Code § 12.1-37-01(5) (indicating child support has the meaning provided in Section 14-09-09.10 of the North Dakota Century Code for purposes of criminal child support nonpayment). 'If there is no current monthly support obligation, the total amount of child support due in each month is [a]n amount the obligor is ordered to pay toward an arrearage if that amount is included in an order issued when there is no current monthly support obligation.' N.D. Cent. Code § 14-09-09.30(2)(c). Child support payments 'continue in effect until all child support obligations have been satisfied with respect to each child subject to the order.' N.D. Cent. Code § 14-09-08.1(2)(d) Reading the foregoing language together, child support arrears is considered the same as child support." (A-7 to A-8)

Therefore, Judge Irby concluded the statute of limitations did not preclude prosecution because Defendant had failed to pay court ordered arrearage from February 10, 2004 through February 9, 2007. (A-8)

Judge Irby misinterpreted the statute and usurped the legislature's intent. N.D.C.C. § 12.1-37-01 is clear and free of ambiguity. The definition of child support is

clearly defined in § 14-09-09.10(3). No where in the definition does it mention arrearage. In interpreting a statute, words are to be understood in their ordinary meaning. N.D.C.C. § 1-02-02. Arrearage is not synonymous with child support. Judge Irby impermissibly incorporated two other statutes into the statute. This is contrary to the plain language of the statute. The legislature mandated:

"For purposes of this section, 'child support' has the meaning provided in section 14-09-09.10."
N.D.C.C. § 12.1-37-01(5)

The statute does not state for the definition of child support all of Chapter 14-09 shall be incorporated therein. Instead, it specifically limits the definition as set forth in section 14-09-09.10.

Furthermore, Judge Irby failed to acknowledge the general rule in N.D.C.C. § 29-04-02. In light of the general rule, the legislature has specifically created exceptions, for example, gross sexual imposition cases and child victims in sexual abuse cases. See N.D.C.C. § 29-04-02.1, N.D.C.C. § 29-04-03.1, and N.D.C.C. § 29-04-03.2. If the legislature had intended for the statute of limitations in felony child support cases to be indefinite,⁴ the legislature would have amended the statute.

Moreover, Judge Irby's expansive interpretation of the statute runs afoul of statute of limitations principles in

⁴ Assuming arguendo that Defendant timely pays his monthly obligation for the next five years, according to Judge Irby's rationale, in November 2012, Defendant would still be subject to felony prosecution since the arrearage would still be over \$2,160.

criminal cases. The North Dakota Supreme Court has said "statutes of limitation are be construed liberally in favor of the accused and against the prosecution." State v. Hersch, 445 N.W.2d 626, 631 (N.D. 1989). Likewise, the United States State Supreme Court said criminal statutes of limitations must "be liberally interpreted in favor of repose." United States v. Scharton, 285 U.S. 518, 522, 52 S. Ct. 416, 417 (1932).

Most importantly, Judge Irby failed to follow the holding in Fuson v. Schaible, 494 N.W.2d 593 (N.D. 1992). This court has interpreted the statute of limitations in a civil child support case. In Fuson v. Schaible, 494 N.W.2d 593, 599 (N.D. 1992), in a three to two decision,⁵ this court held that "[o]nce the child support obligation terminates, the statute of limitation begins to run, not before." Once the child is emancipated, an action upon a judgment must be brought within the statute of limitations. Id. at 599.

In Ruscheinsky v. Ulrich, 2000 ND 133, ¶ 11, 612 N.W.2d 283, this court reinstated the general rule that the statute of limitations period begins "when the duty to support terminates." "Ulrich's child support duty terminated when the child reached the age of majority on October 18, 1989, and the limitations period normally would have run on October 18, 1999." Id. at ¶ 11.

However, in response to Fuson, the legislature amended

⁵ Due to Justice VandeWalle's special concurrence, the dissent was the majority opinion on the issue of the running of the statute of limitations.

the statute of limitations in civil child support cases. "In 1999, the legislature again amended N.D.C.C. § 14-08.1-05, providing: '[t]he due and unpaid payments and any judgment entered in the judgment docket pursuant to this section are not subject to the statutes of limitations provided in chapter 28-01, nor may such judgment be canceled pursuant to section 28-20-35.' 1999 N.D. Sess. Laws ch. 140, § 1. This amendment was intended to 'allow collection of unpaid child support throughout the life of the person who fails to pay his or her support and then through the probate of that person's estate.' Hearing on S.B. 2288 Before the Humans Services Committee, 56th N.D. Legis. Sess. (January 27, 1999) (testimony of Senator Wayne Stenehjem)." Id. at ¶ 8.

It is important to note the legislature did not amend N.D.C.C. § 12.1-37-01 after Fuson. The only rationale inference that can be made by this legislative inaction is the legislature intended for the three year statute of limitations period to continue to commence when the child reaches majority.

The Michigan Supreme Court recently rejected the argument that child support arrearage tolls the statute of limitations in criminal cases. In People v. Monaco, 710 N.W.2d 46, 51 (Mich. 2006), the Michigan Supreme Court held the defendant's child support arrearage was not a continuing offense. The crime was complete at the time the requirements of the criminal statute were fulfilled. Therefore, once the

child turned eighteen, the six year statute of limitation period commenced. Id. at 51.

In Monaco, in 1984, the defendant was ordered to pay child support for his two minor children. In March 1994, the defendant's youngest child turned eighteen. In December 2002, the defendant was charged with felony failure to pay child support. Defendant's arrearage was over \$57,000.00. Id. at 47-48.

The Michigan Supreme Court reversed the defendant's conviction, stating the statute of limitations barred prosecution. Id. at 51. The court relied on the plain language of the statute. And the fact the legislature did not expressly insert language in the statute that the offense "shall be considered to be a continuing offense" as it had for the crimes of desertion and abandonment. Id. at 51. "Courts cannot assume that the Legislature inadvertently omitted from one statute language that it placed in another statute." Id. at 51.

For the aforementioned reasons, it is clear that Judge Irby incorrectly interpreted the statute of limitations for felony Willful Failure to Pay Child Support. Under Fuson and the plain language of N.D.C.C. § 29-04-02 and N.D.C.C. § 12.1-37-01, this Honorable Court must reverse Defendant's conviction.

CONCLUSION

Wherefore the reasons stated herein, Defendant respectfully requests that this Honorable Court reverse the September 18, 2007 Judgment, allow Defendant to withdraw his Conditional Plea of guilty, and dismiss the case because the statute of limitations bars prosecution.

Dated this 29th day of November, 2007.



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