

ORIGINAL (e-filed)

20070189 - 20070191

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	
Plaintiff/ Appellee.)	
)	Supreme Court No. 20070189/190/191
)	
-vs-)	District Court No. 06-K-406/407/408
)	
Art Tibor,)	
Defendant/ Appellant.)	

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 17 2007

BRIEF OF APPELLANT

STATE OF NORTH DAKOTA

APPEAL FROM CRIMINAL JUDGMENT
DATED JUNE 8, 2007.
OF NORTHWEST JUDICIAL DISTRICT
THE HONORABLE GERALD RUSTAD, PRESIDING

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TABLE OF CONTENTS

Table of Contents	p. ii
Table of Authorities	p. iii
Statement of the Issues	
I. Did the trial court err when it denied Tibor’s Motion to Dismiss when the charges against Tibor were barred by the statute of limitations?	p. 1
Statement of the Case	
A. Nature of the case, course of the proceedings, and disposition in the trial court.	¶ 1
B. Statement of facts	¶ 7
Law and Argument	
A. Jurisdiction	¶ 18
B. Did the trial court err when it denied Tibor’s Motion to Dismiss when the charges against Tibor were barred by the statute of limitations?	¶ 20
Conclusion	¶ 42

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TABLE OF AUTHORITIES

Cases

<i>State v. Berger</i> , 2001 ND 44, 623 N.W.2d 25.	¶ 20
<i>State v. Davenport</i> , 536 N.W.2d 686, (N.D. 1995).	¶ 28
<i>State v. Goebel</i> , 2007 ND 4, 725 N.W.2d 578.	¶ 27, 28
<i>State v. Hersch</i> , 445 N.W.2d 626 (N.D. 1989).	¶ 22, 30
<i>U.S. v. DiSantillo</i> , 615 F.2d 128 (C.A. Pa., 1980).	¶ 22

Statutes, North Dakota

N.D.C.C. § 1-02-02	¶ 30
N.D.C.C. § 29-04-03.1	¶ 27, 36, 37, 38
N.D.C.C. § 29-04-03.2	¶ 27, 36, 37
N.D.C.C. § 29-28-03	¶ 19
N.D.C.C. § 29-28-06	¶ 19

Statutes, Virginia

VA Code Ann. § 63.2-1509	¶ 33
VA Code Ann. § 63.2-1510	¶ 32, 37

Other Material

Black's Law Dictionary 927 (6th ed. 1990). ¶ 22

21 Am. Jur. 2d Criminal Law § 291 ¶ 22

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STATEMENT OF THE ISSUES

- I. Did the trial court err when it denied Tibor's Motion to Dismiss when the charges against Tibor were barred by the statute of limitations?

STATEMENT OF THE CASE

A. Nature of the case, course of the proceedings, and disposition in the trial court.

[¶ 1] On April 11, 2006, three complaints were filed with the District Court against Tibor under file numbers 06-K-406, 407, and 408. (App. at 7-9). All three complaints charged Gross Sexual Imposition, two as Class A felonies and one as a Class B felony. (App. at 7-9). The State filed corresponding Information and Amended Information in each file. (App. at 10-12; 22-24). Tibor pled not guilty to all three charges.

[¶ 2] On October 9, 2006, Tibor filed a motion to dismiss the charges in all three files. (App. at 13-17). Tibor asserted that the statute of limitations had expired for the criminal charges and moved the court to dismiss the charges in all three files. The State filed a response to the motion arguing that the statute of limitations had not expired and that they did not begin to run until law enforcement in North Dakota was notified in March 2006. (App. at 18-20). The court denied Tibor's motion to dismiss. (App. at 21).

[¶ 3] A jury trial was held January 24-26, 2007. The Honorable Gerald Rustad presided. The issue of statute of limitations was also raised during the jury trial. (T. at 118, 151-154, 196-197). The court continued to maintain that the statute of limitations had not expired. (T. at 153-154).

[¶ 4] The case was given to the jury at approximately 4:30 p.m. on Thursday, January 25, 2007. (T. at 228). The jury sent a note stating that there was a hung jury approximately four hours into deliberations. (T. at 229; 231). The court made the decision to recess for the evening and resume in the morning. (T. at 234). The jury was released for the night and began deliberations again the following morning. (T. at 235). The following morning, January 26, 2007, the jury returned a unanimous verdict of guilty on all three counts. (T. at 236-240).

[¶ 5] The criminal judgment was entered on June 8, 2007. (App. at 25-41). Tibor was sentenced under file number 06-K-406 to ten years to run concurrent with 407 and consecutive to 408; ten years under file 06-K-407 to run consecutive with 408; and fifteen years under file 06-K-408 with credit for one hundred thirty-four days served and to be served concurrent with a sentence imposed in a separate action. (App. at 25-41).

[¶ 6] A notice of appeal was filed on June 25, 2007, appealing the June 8, 2007, Criminal Judgment. (App. at 42).

B. Statement of facts

[¶ 7] Art Tibor and Karen Barnett were married in 1980 (T. at 157) and a child, M.B., was born in November 1982 (T. at 158). In 1984, Tibor and Karen divorced and M.B. had no contact with his father until Karen brought M.B. to North Dakota in the summer of 1990 (T. at 164, 59-60) to visit with family he had not seen in many years. (T.

at 60). Karen returned to Virginia after approximately a week in North Dakota; M.B. stayed in North Dakota with Don and AnnaMarie Herrly, Tibor's sister and brother-in-law, in Hebron. (T. at 60-61, 164). After approximately one year with the Herrly's, M.B. went to live with Adeline Tibor, Tibor's mother. (T. at 165), before moving to Williston, North Dakota. to live with Tibor in the summer of 1991. (T. at 168). In the summer of 1993. M.B. moved back to Virginia to live with his mother. (T. at 69). Tibor had very little contact with M.B. after he left North Dakota, (T. at 176), as did much of Tibor's family. (T. at 177).

[¶ 8] Approximately one week after returning to Virginia to live with his mother, M.B. disclosed to his mother that improper touching had occurred while he was in North Dakota but did not disclose details. (T. at 66). Then approximately two weeks after the initial disclosure. M.B. described the alleged incidents in more detail. (T. at 67). Karen contacted Fairfax County Child Services in Virginia to report the alleged sexual conduct (T. at 67, 75), and to have them conduct an investigation. (T. at 75). Fairfax County Child Services took a report regarding the allegations and came out to the house and spoke with Karen. (T. at 71). Karen followed up on the report through several phone calls but, the case was never referred to North Dakota. (T. at 72-73).

[¶ 9] The next reporting of the incident occurred while M.B. was in seventh grade in Virginia. (T. at 41). M.B. wrote a letter in Mr. Carter's office, the school guidance counselor, describing the alleged sexual conduct. (T. at 41). At the same time the letter was written, M.B. met with Beth Idding from Child Protective Services in Virginia. (T. at 54).

[¶ 10] In 1996, M.B. began being treated by Dr. Lisa Navam, a licensed clinical psychologist, to whom he also disclosed the alleged conduct. (T. 47. 130-131). In addition, to M.B.'s disclosure to Dr. Nava, Karen also spoke with Dr. Nava about referring the matter to Child Protective Services. (T. at 73). Dr. Nava reported the alleged sexual abuse to Child Protective Services. (T. at 142, 143). She also coordinated with Beth Iddings from Child Protective Services when they were conducting an investigation, (T. at 149), after M.B.'s grandfather contacted Child Protective Services. (T. at 142).

[¶ 11] In March 2006, M.B. contacted the Williams County State's Attorney's Office, who in turn contacted the Williston Police Department. (App. at 18-20). At the time of the March 2006 contact with Williams County State's Attorney, M.B. was twenty-three years old.

[¶ 12] On April 11, 2006, three complaints were filed with the District Court against Tibor under file numbers 06-K-406, 407, and 408. (App. at 7-9). All three complaints charged Gross Sexual Imposition, two as Class A felonies and one as a Class B felony. (App. at 7-9). The State filed corresponding Information and Amended Information in each file. (App. at 10-12: 22-24). Tibor plead not guilty to all three charges.

[¶ 13] On October 9, 2006, Tibor filed a motion to dismiss the charges in all three files. (App. at 13-17). Tibor asserted that the statute of limitations had expired for the criminal charges and moved the court to dismiss the charges in all three files. The State filed a response to the motion arguing that the statute of limitations had not expired and that they did not begin to run until law enforcement in North Dakota was notified in March 2006. (App. at 18-20). The court denied Tibor's motion to dismiss. (App. at 21).

[¶ 14] A jury trial was held January 24-26, 2007. The Honorable Gerald Rustad presided. The issue of statute of limitations was also raised throughout the jury trial. (T. at 118, 151-154, 196-197). The court continued to maintain that the statute of limitations had not expired. (T. at 153-154). The court stated that the reporting to Child Protective Services in Virginia did not constitute the reporting that brings into play the statute of limitations. (T at 153-154).

[¶ 15] The case was given to the jury at approximately 4:30 p.m. on Thursday, January 25, 2007. (T. at 228). The jury indicated there was a hung jury approximately four hours into deliberations. (T. at 229; 231). The court made the decision to recess for the evening and resume in the morning. (T. at 234). The jury was released for the night and began deliberations again the following morning. (T. at 235). The following morning, January 26, 2007, the jury returned a unanimous verdict of guilty on all three counts. (T. at 236-240).

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LAW AND ARGUMENT

A. Jurisdiction

¶ 18] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provide as follows:

¶ 19] An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.

N.D.C.C. § 29-28-06.

B. Did the trial court err when it denied Tibor's Motion to Dismiss when the charges against Tibor were barred by the statute of limitations?

¶ 20] The North Dakota Supreme Court has outlined the standard of review for preliminary proceedings, including a motion to dismiss in a criminal case, in *State v.*

Berger. The Court stated that

We will not reverse a trial court's findings of fact in preliminary criminal proceedings if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the findings and if the trial court's decision is not contrary to the manifest weight of the evidence.... This deferential standard of review recognizes the importance of the opportunity of the trial court to observe and assess the credibility of witnesses.

State v. Berger, 2001 ND 44, ¶ 11, 623 N.W.2d 25 (citations omitted).

¶ 21] The charges against Tibor were barred by the statute of limitations and the trial court erred when it denied Tibor's Motion to Dismiss.

¶ 22] Statutes of limitations are defined as:

[s]tatutes of the federal government and various states setting maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.

Black's Law Dictionary 927 (6th ed. 1990). Statutes of limitations are “designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.” *U.S. v. DiSantillo*, 615 F.2d 128, 134 (C.A. Pa., 1980). *See also* 21 Am. Jur. 2d Criminal Law § 291. The North Dakota Supreme Court has stated that “the 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, 629 (N.D. 1989).

[¶ 23] The statute of limitations in this case had run by the time the criminal complaint was filed in April 2006. To allow a prosecution after the statute of limitations had expired would be contrary to the law and the public policy behind enacting statute of limitations. The statutes of limitations are put in place to prevent Defendants from having to defend themselves against stale or fraudulent claims. As time passes, evidence becomes stale or is destroyed, memories fade, people move or pass away; and ultimately the resources and evidence needed to defend oneself from a claim is gone.

[¶ 24] Tibor filed a motion to dismiss all three case files on October 9, 2006, on the basis that the charges were barred by the statute of limitations. (App. at 13-17). Tibor maintained that once the alleged incidents were disclosed. between 1993 and 1996. to Child Protective Services in Fairfax County Virginia, the agency which investigates child abuse and neglect in that State, the statute of limitations began to run. Therefore, Tibor

argues the time for bringing the action had expired when the charges were brought. (App. at 13-17).

[¶ 25] The State submitted a response to Tibor's motion to dismiss arguing that the statute of limitations did not begin to run when the alleged incident was reported to Child Protective Services in Fairfax County Virginia. (App. at 18-20). Instead, the State contends that the statute of limitations did not begin to run until March of 2006, when M.B. contacted the Williams County State's Attorney's Office, which in turn contacted the Williston Police Department. (App. at 18-20).

[¶ 26] The trial court issued an order on October 20, 2006, denying Tibor's motion to dismiss. (App. at 21). The order stated the motion was denied based on the court's conclusion that "information from a psychologist to Child Protection Services in Fairfax County, Virginia, in 1997 does not constitute reporting to law enforcement authorities as contemplated by 29-04-03.1 NDCC." (App. at 21).

[¶ 27] There are two applicable statutes under North Dakota law which pertain to the statute of limitations for prosecution of sexual abuse of minors: Section 29-04-03.1, N.D.C.C. and Section 29-04-03.2, N.D.C.C., which are to be read in tandem. *State v. Goebel*, 2007 ND 4, ¶ 25, 725 N.W.2d 578. Section 29-04-03.1 states:

A prosecution for violation of section 12.1-20-03 through 12.1-20-08 or of section 12.1-20-11 if the victim was under eighteen years of age at the time the offense was committed must be commenced in the proper court within seven years after the commission of the offense or, if the victim failed to report the offense within this limitation period, within three years after the offense was reported to law enforcement authorities.

Section 29-04-03.2 states that “[i]f the victim of a violation of chapter 12.1-20 is under the age of fifteen, the applicable period of limitation, if any, does not begin to run until the victim reached the age of fifteen.”

[¶ 28] The Court has stated that the three-year provision was intended to extend the statute of limitations beyond the seven-year provision if the victim failed to report the offense within the seven-year period. *Goebel*, 2007 ND 4, ¶ 25, (citing *State v. Davenport*, 536 N.W.2d 686, 690-691 (N.D. 1995)) (emphasis added). The Court elaborated that the three-year clause “applies only if the victim failed to report within the seven-year period.” *Davenport*, 536 N.W.2d at 690. The Court has elaborated that because Sections 29-04-03.1 and 29-04-03.2 are to be read together, the initial seven-year limitation period does not begin to toll until the victim reaches the age of fifteen; therefore, the seven year period does not end until the victim reaches the age of twenty-two. *Goebel*, 2007 ND 4, ¶ 25. The three-year addition “was intended to *extend* the limitation period beyond the seven years, especially in cases of repressed memory of childhood sexual abuse.” *Davenport*, 536 N.W.2d at 691.

[¶ 29] The key dates under Section 29-04-03.1 and 29-04-03.2, N.D.C.C., are the date of birth of the victim, which is November of 1982; the date the alleged incidents occurred, which is approximately 1991-1993; the date the victim turned 15 years old, which is November of 1998; and seven years after the victim turned 15 years old, which is November of 2005. The other date used under 29-04-03.1, N.D.C.C., is three years after the offense was reported to law enforcement authorities; however, this date is not applicable to the case at hand since the alleged incidents were reported within the seven year time period.

[¶ 30] When interpreting a statute, the statutory language “must be given its plain, ordinary, and commonly understood meaning.” *Hersch*, 445 N.W.2d at 630. A statute’s wording is to be understood in the ordinary sense unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Additionally, statutes “are to be construed liberally in favor of the accused and against the prosecution.” *Hersch*, 445 N.W.2d at 631.

[¶ 31] In the case at hand, the alleged sexual abuse was reported before the seven year statute of limitations expired in 2005 when M.B. turned twenty-two. M.B. reported the alleged sexual conduct to his mother, Mr. Carter, his guidance counselor, and to Dr. Lisa Nava, his psychologist. In turn, his mother, his grandfather, and Dr. Nava all reported the alleged sexual conduct to Child Protective Services who conducted an investigation.

[¶ 32] M.B.’s mother, Karen reported the alleged sexual conduct when she called Child Protective Services in Fairfax County Virginia, shortly after M.B. returned in the summer of 1993. (T. at 74-75: 67-69). Under Virginia law, any person who suspects that a child is an abused or neglected child may make a complaint to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred. VA Code Ann. § 63.2-1510. Karen’s purpose for calling Child Protective Services was for them to investigate the allegations against Tibor. (T. at 75). It appears, however, that Child Protective Services in Virginia failed to follow-up after Karen contacted them. (T. at 75).

[¶ 33] In 1996, Dr. Nava also reported M.B.’s allegations of sexual abuse to Child Protective Services. (T. at 142, 140). Dr. Nava is a mandatory reporter. (T. at 140). Under Virginia law, the state in which she was employed and resided, Dr. Nava was required to

report the suspected abuse or neglect “immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline.” VA Code Ann. § 63.2-1509. Dr. Nava was required to report to Child Protective Services and did in fact make a report to Child Protective Services in Virginia during the course of her treatment of M.B. (T. at 141-142).

[¶ 34] In approximately 1997, M.B. disclosed the allegations of sexual abuse to his maternal grandfather after writing a letter detailing the alleged sexual abuse. (T. at 142). M.B.’s grandfather reported the alleged sexual abuse by contacting Child Protective Services in Virginia. (T. at 142; App. at 13-17).

[¶ 35] The alleged sexual abuse and conduct was reported to the proper authorities by three different people between 1993 and 1997 which is clearly within the seven-year time period outlined in the statute. Child Protective Services is the entity which investigates child sexual abuse allegations. (T. at 141). Child Protective Services is in charge of conducting investigations to determine whether there is a founded case of abuse or neglect. (T. at 141). In the case at hand, the allegations were reported to Child Protective Services in Virginia which conducted an investigation regarding the allegations. (T. at 149). Clearly, the allegations of sexual conduct and abuse were reported and an investigation was performed. Accordingly, the seven-year limitation would apply requiring the action to be commenced in the proper court before November 2005, since the victim did not fail to report the offense within the limitation period.

[¶ 36] Section 29-04-03.1 and 29-04-03.2, N.D.C.C., when read together, require that the criminal action be commenced within seven years after the offense was

committed, but the seven years does not begin to run until the alleged victim turns fifteen. In the broadest sweep, the action was required to have been commenced by M.B.'s twenty-second birthday. *See* N.D.C.C. §§ 29-04-03.1, 29-04-03.2. The exception to this only applies "if the victim failed to report the offense within this limitation period". N.D.C.C. § 29-04-03.1. Here, the offense was clearly reported multiple times before M.B.'s twenty-second birthday.

[¶ 37] When interpreting a statute, the statutory language is to be given its plain, ordinary, and commonly understood meaning. *Hersch*, 445 N.W.2d at 630. While it appears that none of the reports made in Virginia were forwarded to authorities in North Dakota, there is no requirement under the applicable North Dakota or Virginia statutes for the reports to be forwarded to another agency, entity, or state. On the contrary, under the Virginia statute, the reporting may occur where the child resides or where the abuse occurred. VA Code Ann. § 63.2-1509, 1510. Here, the reports were made where the child resided. The language in the North Dakota statutes does not specify where the report should be made or who specifically the report needs to be made to within the seven-year period. *See* N.D.C.C. § 29-04-03.1, 29-04-03.2.

[¶ 38] The State has contended that all reports have to be made to law enforcement to be considered as a report. Sections 29-04-03.1 and 29-04-03.2, N.D.C.C., however, do not mention reporting to law enforcement with the standard seven year period; the only time under the statute that reporting specifically to law enforcement is required is if the three year extension comes into play. *See* N.D.C.C. § 29-04-03.1. A reading of the applicable statutes concludes that they dictate that only reports made to police officers in the correct jurisdiction qualify as reporting and start the statute of

limitations running would be contrary to the rules governing interpretations of statutes and to public policy.

[¶ 39] If the legislature intended that only reports made to law enforcement officers began the running of the statute of limitations, they would have include that language in the statute. Instead, the statute is silent as to which specific entity, if any, the reports within the seven year period are to be made to. Accordingly, it is absurd to believe that reports made to Child Protective Services, the entity mandatory reports are required to report to and which is in charge of conducting investigations to determine whether there is a founded case of abuse or neglect (T. at 141), would not be deemed reporting under the statute. Common sense dictates that reports of abuse to mandatory reporters who in turn are required under the law to report allegations of abuse to the proper authorities, Child Protective Services, would constitute a report under the statute. Anything to the contrary would diminish the unique status of mandatory reporters and the reporting requirement: it would make the reporting requirement void.

[¶ 40] Additionally, this is not a scenario where the legislative intent of extending the limitation to allow for reporting of abuse in the case of repressed childhood memories would apply. M.B. did not have repressed memories; he reported the allegations shortly after returning to Virginia with his mother and then made several additional reports throughout at least the next four years.

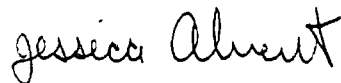
[¶ 41] What appears to have occurred in the case at hand is that a minor child reported allegation of abuse to his mother, his grandfather, his school counselor, and his psychologist. In turn, they made reports to Child Protective Services in the county where the child resided, Fairfax County, Virginia, in accordance with the laws of the state. Child

Protective Services in Virginia conducted an investigation and apparently either deemed there was no basis to the allegations or failed to convey the report to the proper authorities. Then approximately fourteen years after the alleged acts took place, a man is criminally charged. This is exactly the situation statute of limitations were designed to deal with. Whatever the determination of Child Protective Services in Virginia was, the reports were made to this entity and they had an obligation to follow up on the reports since the alleged victim resided in that county. Even under the broadest interpretation of the applicable statute of limitations, any action must have been brought by November of 2005. Prosecution of this case was outside of the statute of limitations and the trial court erred when it denied Tibor's Motion to Dismiss based upon the assertion that the statute of limitations barred the charges. Prosecution of a crime once the statute of limitations has run is contrary to the laws of this state and to public policy.

CONCLUSION

[¶ 42] Based on the facts and law provided, the Criminal Judgment entered by the District Court should in all things be DISMISSED.

Dated this 12th day of December, 2007.



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IN DISTRICT COURT, COUNTY OF WILLIAMS, NORTH DAKOTA

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)	Certificate of Service
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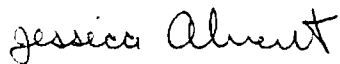
I, Jessica J. Ahrendt, do hereby certify that on December 17, 2007, I served the following documents:

Brief of Appellant
Appendix
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North Dakota Supreme Court
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Dated this 17th day of December, 2007.



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