

ORIGINAL (e-filed)

20070189

IN THE SUPREME COURT

20070190

STATE OF NORTH DAKOTA

20070191

State of North Dakota,)
)
Plaintiff-Appellee,)
)
vs.)
)
Art Tibor,)
)
Defendant-Appellant.)

Supreme Court Nos. 20070189
20070190
20070191

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JAN 30 2008

STATE OF NORTH DAKOTA
APPEAL FROM THE WILLIAMS COUNTY DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

THE HONORABLE GERALD RUSTAD, PRESIDING

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

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1. STATEMENT OF THE ISSUES

2. 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?

3. STATEMENT OF THE CASE

4. The Defendant's brief correctly recites a broad procedure of this case. The State, however, would like to supplement with the following:
5. On March 23, 2006, Detective Tom Ladwig of the Williston Police Department received information that McLean Barnett had been sexually molested by his father, Art Tibor. Detective Ladwig contacted McLean Barnett on the same date and law enforcement began its investigation.
6. Subsequently, on April 11, 2006, Art Tibor was charged with three separate charges of Gross Sexual Imposition:
7. Criminal Number 06-K-0406 – Gross Sexual Imposition, Class B Felony, charged Art Tibor with engaging in sexual contact with another, and the victim was under the age of 15, that being John Doe, age 10 to 11, by fondling John Doe's testicles.
8. Criminal Number 06-K-0407 – Gross Sexual Imposition, Class A Felony, charged Art Tibor with engaging in sexual acts with another, and the victim was under the age of 15, that being John Doe, age 10 to 11, by inserting his penis into John Doe's anus.
9. Criminal Number 06-K-0408 – Gross Sexual Imposition, Class A Felony, charged Art Tibor with engaging in sexual acts with another, and the victim was under the age of 15, that being John Doe, age 10 to 11, by inserting his penis into John Doe's mouth.. .

10. STATEMENT OF THE FACTS

11. McLean Barnett (hereinafter "Mac") testified that he is the biological son of

Karen Barnett and Art Tibor. (T. at 30). Mac testified that he lived with his Uncle Don and Aunt AnnaMarie when he arrived in North Dakota. (T. at 31). Mac testified that he then came to Williston to live with his father, Art Tibor, (hereinafter "Art") when Mac was in the fourth grade. (Id.)

12. Mac testified that Art started to touch Mac in ways Mac didn't like and the touching involved different body parts. (T. at 32). Mac testified that the first time he remembered being touched by Art was during a bad storm. Mac testified that he went into Art's bedroom to ask if he could sleep in bed with Art as he was scared of the storm. (T. at 33). Mac testified that Art exposed his penis to Mac and wanted Mac to touch it saying that Mac's mom used to do that for Art. (Id.) Mac testified that Art motioned for Mac to come over and Mac put his head over Art. (T. at 34). Mac testified that Art pushed his head on top of Art's penis and showed Mac, holding Mac's head, what Mac should do. (Id.)
13. Mac testified that Art asked Mac to take off Mac's shorts and Art wanted to perform the act on Mac. (T. at 35). Mac testified Art came towards Mac, who was holding his knees, and Art reached under Mac's leg and grabbed Mac's testicles and fondled them. (Id.). Mac testified that he started to squirm and try to get away from Art. (Id.) Mac testified that he ran into the bathroom and locked himself inside. (Id.) Mac testified that this was not the only incident of Art touching Mac's testicles. (Id.) Mac testified that he and Art were coming back from the airport late one night and Mac was lying down on the bench seat of Art's truck with his head towards Art's lap. (Id.) Mac testified that he woke up and Art's hand was down Mac's pants touching his testicles. (Id.)
14. Mac testified that there was another night that Mac laid in Art's bed facing away from Art when Art came up behind Mac and grabbed Mac's thigh and pulled it up

trying to put his penis inside of Mac. (T. at 36). Mac testified that he began to scream because it hurt so bad. (Id.) Mac testified that he was squirming to stop but Art attempted to try again. (Id.). Mac testified that he squirmed so much that he fell off the bed and just ran towards the bathroom. (Id.).

15. Mac testified that he was asked countless times to put Art's penis in his mouth. (T. at 37). Mac testified that during one instance, Art told him to pretend that Art's penis was a popsicle and during that incident Art ejaculated into Mac's mouth and Mac spit it out, gagging. (Id.). Mac testified that when he would spit out ejaculate Art would get very angry with Mac. (Id.)
16. Mac testified that Art told him that if Mac ever told anybody what was going on between them, he would kill Mac and his mother. (T. at 38).
17. Mac testified that he never told his mom what was going on because he was afraid that Art would hurt her. (T. at 40). Mac testified that he never told anyone in North Dakota what had happened to him. (Id.) Mac testified that he returned to live with his mom in Virginia. (Id.) Mac testified that he remembers part of the day he left Williston because Art told him if you tell anybody, I'll kill you and your mom. (Id.)
18. Mac testified that after a while he did tell his mom about some physical abuse Art directed towards Mac but didn't tell her a lot of details. (T. at 41). Mac testified that his mom asked something about sexual abuse but Mac just became numb and doesn't remember after that. (Id.). Mac testified that he told his guidance counselor about the sexual abuse when he was in the seventh grade. (Id.). Mac testified that he wrote out a statement in the guidance counselor's office regarding what had happened between Mac and Art. (Id.) (See State's Exhibit #1).
19. Mac testified that he started seeing Dr. Lisa Nava, a therapist, and that he saw her for approximately two years. (T. at 47). Mac testified that he did tell Dr. Nava about

the things Art did to Mac, but not in great detail. (Id.)

20. McLean testified that in 2006 he had been talking to his Uncle Don in North Dakota and decided to contact North Dakota authorities regarding the sexual abuse by Art. (T. at 49).
21. During cross examination, Mac testified that he remembered talking to a lady from Child Protective Services in Virginia while in the guidance counselor's office. (T. at 54). Mac testified that he only talked with her once and never had any follow-up conversations with her and never talked to anyone else with law enforcement in Virginia. (Id.) Mac also testified that he never heard from Art once he returned to Virginia except for one phone call regarding Mac's North Dakota belongings that Art never returned. (T. at 57).
22. McLean Barnett's mother, Karen Barnett, (hereinafter "Karen") testified that she brought Mac to North Dakota to see his grandmother. (T. at 60). Karen testified that she left to go back to Virginia after about a week but let Mac stay as Mac was having fun meeting all his relatives. (Id.). Karen testified that she didn't know Mac went with Art until after he was gone. (Id.). Karen testified that when she finally made contact with Mac, Mac was hysterical, crying, asking to come home or that Karen come and get him. (T. at 61-62). Karen testified that Mac was returned to Virginia and that she didn't recognize him as Mac was very pale, very thin. his clothes were baggy, and he was all bones. (T. at 63). Karen testified that when she tried to hug him, Mac moaned and pulled away saying he was in terrible pain. (Id.). Karen testified that she saw that Mac was covered with bruises and Mac's behavior was concerning. (Id.) Karen testified that Mac would always lock the doors when he went in the bathroom and his bedroom, even if just for a minute and that Mac would sleep in a fetal position all curled up with his back always to the wall. (T. at 64).

Karen testified that Mac started to do poorly in school and Mac had a vacant look like he's not there. (T. at 65). Karen testified that Mac told her, after he had been home almost three weeks, what Art did to him. (T. at 67). Karen testified that she immediately called Children Services. (Id.). Karen testified that Children Services took a report and she never heard from them since. (Id.) Karen testified that she did some follow-up as to why they weren't contacting her and was told that they couldn't find files, then she was told there wasn't anything they could do because it was in North Dakota. (Id.). Karen testified during cross examination that Child Protective Services refused to follow-up on her report. (T. at 75).

23. Dr. Lisa Nava (hereinafter "Nava") testified that she has been a private practice clinical psychologist since 1995. (T. at 127). Nava testified that she started seeing McLean Barnett in January 1996. (T. at 130). Nava testified that their last session was on July 31, 1998. (Id.) Nava testified that her initial diagnosis of Mac was that he had an adjustment disorder with disturbance of his emotions. (T. at 130-131). Nava testified that an adjustment disorder is diagnosed when someone has gone through a stress or a series of stressors that result in behavior change or change in emotional functioning. (T. at 131). Nava testified that Mac claimed to have been abused by Art physically, emotionally, sexually, and was also neglected. (T. at 132). Nava testified that Mac wasn't able to talk about any of the experiences in any detail at that point. (Id.). Nava testified that she changed her diagnosis over the first several months of treatment to post-traumatic stress disorder. (Id.). Nava explained that this diagnosis relates to when someone has experienced a traumatic stressful event in which they feel that their life is in danger or they could suffer significant physical harm and experience a feeling like terror or a result of going through that. (Id.).

24. Nava testified on cross-examination that she is a mandatory reporter (T. at 140). Nava testified that she is required to report to Child Protective Services in Virginia. (Id.). Nava testified that she called Child Protective Services early on after Mac had told her that his father had abused him, but Child Protective Services didn't take a report at that time because they did not feel there were enough details. (T. at 142). Nava testified that Child Protective Services in Virginia is a social services agency. (T. at 148).

25. **LAW AND ARGUMENT**

26. 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?

27. N.D.C.C. § 29-04-03.1 states: "A prosecution for violation of sections 12.1-20-03 through 12.1-20-08 or of section 12.1-20-11, where 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 the limitation period, within three years after the offense was reported to law enforcement authorities."

28. The trial court did not err when denying the Defendant's motion to dismiss. It is the State's position that the statute of limitations did not start until March 2006 when the victim reported the sexual abuse to law enforcement authorities in Williston, North Dakota, where the alleged events took place. The Williston Police Department immediately conducted an investigation and charges were filed in April 2006. Prior to this time, there is no evidence any report was ever made to a law enforcement agency. Child Protective Services of Virginia, a social services agency, was notified but did not communicate any information to law enforcement authorities.

29. Dr. Nava, the victim's psychologist, testified that she was required to notify Child Protective Services and she did so. Dr. Nava also testified that Child Protective Services of Virginia is a social services agency. It was Child Protective Services' decision not to pursue the matter or notify the proper authorities in North Dakota.
30. The State argues that information from a psychologist to Child Protection Services in Virginia in 1997 does not constitute reporting to law enforcement authorities as contemplated by 29-04-03.1 NDCC.
31. "When he was eleven years old, J.G. reported the abuse to a therapist at the Children's Home Society in Sioux Falls, South Dakota, but the report never went any further. J.G. first reported the offense to law enforcement authorities on January 31, 2005, at the age of twenty-two. Because J.G. was under the age of fifteen at the time of the offense, the statute of limitations did not begin to run until his fifteenth birthday in 1997. J.G. did not report the offense to law enforcement until January 31, 2005, which fell outside of the initial seven-year limitation period. Therefore, the prosecution had to be commenced within three years after January 31, 2005, when J.G. first reported the offense. Here, the State filed a criminal complaint against Goebel in June 2005, well within the three-year limitation period. Therefore, the district court did not err when it refused to dismiss the charge based on the sexual abuse of J.G." *State v. Goebel*, 2007 ND 4, 725 N.W.2d 578 (N.D. 2007) .
32. The present case is on point with *Goebel*. In *Goebel*, the sexual abuse was reported to a therapist when the victim was eleven years old but the information never went any further. The victim did not report the incident to law enforcement authorities until January 2005 when the victim was 23 years of age and criminal charges were filed in June 2005, within the three-year limitation period. The North Dakota Supreme Court ruled that the district court did not err when refusing to

dismiss the charges.

33. In the present case, the incidents were reported to a therapist between 1996 and 1998, when the victim was 14-15 years of age and subsequently Child Protection Services, but here as well, the information never went any further. The victim reported the incidents to law enforcement authorities in March 2006 at the age of 24 and charges were filed in April 2006.
34. It is inconceivable to the State that the statute of limitations could be triggered in 1993 with a report made to Child Protective Services in Virginia. No information whatsoever made its way to law enforcement authorities. Unless possessing a magical looking glass, law enforcement cannot investigate a criminal offense it knows nothing about.
35. Another case addressing the issue of reporting and the statute of limitations is *State v. Buchholz*, 2004 ND 77, 678 N.W.2d 144 (N.D. 2004). *Buchholz* involved a sexual abuse victim less than fifteen years of age who tried to forget about the incidents that happened to her between 1985 and 1991. The victim decided to report them to law enforcement more than ten years later. The North Dakota Supreme Court stated in *Buchholz*, "...N.D.C.C. § 29-04-03.1 says "if the victim failed to report the offense within [seven years after the commission of the offense]," the action must be commenced "within three years after the offense was reported to law enforcement authorities." There was no evidence the complainant reported the incidents to law enforcement authorities until October 2002. Under these circumstances, there were no issues of fact about whether the applicable statute of limitations had run..." [Emphasis added].
36. The district court did not err in denying the Defendant's motion to dismiss as the State was not barred by the statute of limitations in prosecuting this case.

37. CONCLUSION

38. The State would respectfully request that this Court uphold all the decisions made by the trial court in this case.

Dated this 30th day of January, 2008.

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JAN 31 2008

STATE OF NORTH DAKOTA IN THE SUPREME COURT
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Plaintiff – Appellee,)	Supreme Court Nos.	20070189
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Art Tibor,)		
)		
Defendant – Appellant.)		

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
 :ss.
COUNTY OF WILLIAMS)

Nicole E. Foster, being first duly sworn, deposes and states:

That on the 30th day of January, 2008, at approximately 10:15 AM. the APPELLEE’S BRIEF in the above-entitled matter was served upon counsel for the Appellant via e-mail at the following address:

jessica_mloffic@qwestoffice.net

That the above e-mail address is the one assigned to:

Jessica J. Ahrendt
Attorney on Appeal for Art Tibor

Date this 30th day of January, 2008.

NICOLE E. FOSTER

SUBSCRIBED AND SWORN TO Before me this 30th day of January, 2008.

Shari L. Erdman
Notary Public
Williams County, North Dakota

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20070190

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STATE OF NORTH DAKOTA

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)

:ss.

COUNTY OF WILLIAMS)

Nicole E. Foster, being first duly sworn, deposes and states:

That on the 30th day of January, 2008, at approximately 3:18 PM, the **APPELLEE'S BRIEF WITH CORRECTED CITATIONS** in the above-entitled matter was served upon counsel for the Appellant via e-mail at the following address:

jessica_mloffice@qwestoffice.net

That the above e-mail address is the one assigned to:

Jessica J. Ahrendt
Attorney on Appeal for Art Tibor

Date this 30th day of January, 2008.

NICOLE E. FOSTER

SUBSCRIBED AND SWORN TO Before me this 30th day of January, 2008.

Shari L. Erdman
Notary Public
Williams County, North Dakota