Stay Pending Appeal Rev'd 2009 VT 39
Merits Affirmed 2009 VT 113

**STATE OF VERMONT**
**WINDSOR COUNTY**

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| **In re Stewart Jones** | ) | **Windsor Superior Court** |
| | ) | **Docket No. 201-3-08 Wrcv** |
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**DECISION**
**Cross-Motions for Summary Judgment**

This petition for post-conviction relief requires the court to decide whether a defendant may waive the criminal statute of limitations, 13 V.S.A. § 4501, as part of a plea deal designed to limit his exposure at sentencing. For the following reasons, the court concludes that the criminal statute of limitations may not be waived in Vermont. The court accordingly vacates petitioner Stewart Jones' convictions for burglary and unlawful restraint, and remands the case to the District Court of Vermont, Windsor Circuit, for further proceedings on the original charge of kidnapping.

Both parties have moved for summary judgment, and the material facts are undisputed. On May 6, 2006, petitioner Stewart Jones was charged with two counts of kidnapping based on an incident that occurred more than nine years earlier (February 1997). Kidnapping is an offense which carries a maximum possible sentence of life imprisonment, 13 V.S.A. § 2405(b), and there is no time limit on the commencement of prosecutions for kidnapping, 13 V.S.A. § 4501(a).

After approximately one year of pre-trial proceedings, Mr. Jones entered into a plea agreement with the State of Vermont in which the State agreed to reduce the charges to one count of burglary and two counts of unlawful restraint, and to seek a sentence of no more than 25 years to serve. This agreement limited Mr. Jones' exposure at sentencing from potential life imprisonment to 25 years or less to serve.

The reduced charges of burglary and unlawful restraint were barred by the criminal statute of limitations, however. Prosecutions for burglary must be commenced within six years of the offense, and prosecutions for unlawful restraint must be commenced within three years. 13 V.S.A. § 4501. In order to obtain the plea agreement's proposed benefit of reduced exposure at sentencing, Mr. Jones agreed in the plea agreement to waive "any statute of limitations claim that might apply to these charges." Mr. Jones reiterated his waiver at the change-of-plea hearing, after which the District Court of Vermont, Windsor Circuit (Bent, J.) accepted the nolo contendere plea and found the plea (and the accompanying waiver) to be knowing, intelligent, and voluntary. The District Court subsequently sentenced Mr. Jones to an aggregate sentence of 18 to 22 years to serve on the reduced charges. The sentence was later amended to 14 to 22 years to serve.

Mr. Jones now requests vacatur of the convictions for burglary and unlawful restraint. He contends primarily that the convictions are illegal because the prosecutions for burglary and unlawful restraint were "void" under 13 V.S.A. § 4503, and because the criminal statute of limitations is jurisdictional, and may not be waived in Vermont. See *State v. Delisle*, 162 Vt. 293, 315 (1994) (Johnson, J., concurring); accord *State v. Fogel*, 492 P.2d 742, 744 (Ariz. Ct. App. 1972); *State v. Stillwell*, 418 A.2d 267, 271 (N.J. Super. 1980). In the alternative, Mr. Jones contends that the offenses are time-barred because the police affidavits did not support probable cause on the initial charge of kidnapping.

In response, the State argues that the language of 13 V.S.A. § 4501 protects defendants from prosecutions based on stale evidence, and does not limit the jurisdiction of the court to convict and sentence individuals. In addition, the State argues that the statute of limitations is a substantive right that may be waived by a defendant when doing so would be in their own self-interest (such as by limiting their sentencing exposure). The State therefore argues that the statute of limitations is similar to other constitutional rights that may be waived by a criminal defendant. Accord *Padie v. State*, 594 P.2d 50 (Alaska 1979); *James v. Galetka*, 965 P.2d 567 (Utah 1998). In addition, the State argues that the reasoning of *Delisle* has been called into question by subsequent statutory amendments to 13 V.S.A. § 2310(b).

Other jurisdictions are split on the question of whether the criminal statute of limitations is an affirmative defense (and thus may be waived) or jurisdictional (and thus may not be waived). Some courts have taken the position that the criminal statute of limitations is a "bar to prosecution" that is not jurisdictional, but rather protects defendants by prohibiting the filing of stale charges. *Conerly v. State*, 607 So.2d 1153, 1156–57 (Miss. 1992); *James*, 965 P.2d at 573. These courts usually equate the limitations period with other constitutional rights, such as the right to jury trial, that may be waived when the defendant determines that waiver is in his best interests. See, e.g., *United States v. Wild*, 551 F.2d 418, 423–25 (D.C. Cir. 1977) (affirming waiver of statute of limitations where defense attorney "negotiated for the express written waiver, obviously intending that his client would derive some benefit from it"). These courts would therefore affirm a conviction where the defendant waived the statute of limitations in order to reduce his exposure at sentencing. *James*, 965 P.2d at 573; *Padie*, 594 P.2d at 56–57.

Other courts take the position that limitations periods affirmatively limit the power of the state to prosecute any offense that is barred by the statute of limitations. *Cane v. State*, 560 A.2d 1063, 1065–66 (Del. 1989); *Stillwell*, 418 A.2d at 271. These states describe the criminal statute of limitations as "a limitation upon the power of the sovereign to act against the accused," *Fogel*, 492 P.2d at 744, and therefore conclude that the statute of limitations is a *jurisdictional* bar to untimely prosecutions, and may not be waived.

A majority of the Vermont Supreme Court has never expressly decided whether the criminal statute of limitations may be waived by a criminal defendant. In *State v.*

*Delisle*, 162 Vt. 293 (1994), a majority of the court appeared to assume without deciding that the statute of limitations may be waived by a defendant who seeks a jury instruction on a time-barred, lesser-included offense. In a concurring opinion, however, Justices Dooley and Johnson criticized this assumption and expressed their view that the criminal statute of limitations in Vermont "is not simply an affirmative defense that the defendant may waive if he so chooses." *Id.* at 315 (Johnson, J., concurring). This court therefore begins its analysis by parsing the majority and concurring opinions in *Delisle*.

The legal issue in *Delisle* was whether a defendant charged with murder fourteen years after the alleged commission of the offense is entitled to a jury instruction on the lesser-included offense of manslaughter. Observing that the manslaughter charge was barred by the statute of limitations, the trial judge refused to give the instruction unless the defendant first waived the statute of limitations. 162 Vt. at 300–01. This view was consistent with *Spaziano v. Florida*, 468 U.S. 447 (1984), which held that criminal defendants are not constitutionally entitled to jury instructions on time-barred, lesser-included offenses. Instead, defendants must choose between (1) foregoing an instruction on the time-barred lesser offense or (2) waiving the statute of limitations and obtaining the requested instruction. 468 U.S. at 456; 162 Vt. at 302.

The *Delisle* majority (which consisted of Chief Justice Allen and Justices Gibson and Morse) agreed that criminal defendants are not entitled to obtain instructions on time-barred, lesser-included offenses. See 162 Vt. at 302–03 (explaining that jurors would be misled into thinking that they could find a defendant guilty of an offense for which there could be no judgment of conviction). The majority did not affirm the conviction, however. Instead, the majority took the position that the two options offered by *Spaziano* were a false dilemma, and that criminal defendants should be afforded the opportunity to obtain an instruction informing the jurors that the passage of time precluded prosecution on lesser-included offenses, and that "they must acquit the defendant if they conclude that the evidence would support a conviction of the lesser crime only." 162 Vt. at 305. Holding only that the defendant should have been afforded the opportunity to make *this* choice, the majority reversed the conviction and remanded for a new trial. *Id.* at 307. The majority never expressly held or discussed whether it would have been permissible under Vermont law for the defendant to obtain an instruction by waiving the statute of limitations.[1]

Justices Dooley and Johnson concurred in the judgment of reversal, but disagreed with the fundamental premise of *Spaziano*. They concluded that the trial judge should

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[1] Moreover, the majority omitted the possibility of waiver when it concluded that "the rights of defendants and the integrity of the system would best be maintained by providing defendants with the choice of (1) foregoing an instruction on the time-barred, lesser-included offense, or (2) obtaining an instruction informing the jurors that, because the passage of time precludes prosecution for the lesser offense, they must acquit the defendant if they conclude that the evidence would support a conviction of the lesser crime only." 162 Vt. at 305. Later, the majority suggested that defendants "should not be required to waive the statute of limitations of a lesser-included offense as a condition of having the jury instructed on that offense," but again did not hold whether waiver was permissible at all. *Id.* at 306. Taken together, these passages reinforce this court's conclusion that the majority opinion does not address the waiver issue in a decisive manner.

have given the requested lesser-included instruction without informing the jury that the offense was time-barred. As part of their reasoning, they rejected the majority's "implied" endorsement of the possibility that defendants might obtain the lesser-included instruction by waiving the statute of limitations. As Justice Johnson explained:

> To implement its scheme . . . [the majority] has to impliedly hold that defendant's right to the statute of limitations may be waived. On the contrary, in Vermont, the statute of limitations is not simply an affirmative defense that defendant may waive if he chooses. Section 4503 of Title 13 provides that prosecutions for felonies and misdemeanors commenced after the statute of limitations has run 'shall be void.' See *In re Mullestein*, 148 Vt. 170, 173–74 (1987) (where Legislature provides time limit for action and consequence for failure to meet it, statutory language is mandatory). As we held recently, 'once the statute of limitations in effect at the time of the alleged offense runs out . . . a criminal, by grace of the legislature, is granted a right to be free of prosecution . . . .' *State v. Petrucelli*, 156 Vt. 382, 384 (1991).
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> Various policy considerations underlie a criminal statute of limitations. It protects potential defendants from having to defend against charges when the passage of time has obscured basic facts, it encourages law enforcement officials to investigate possible wrongdoing promptly, and it creates a fixed time period following the occurrence of the punishable act in which a person is exposed to criminal prosecution through the power of the state. *State v. Burns*, 151 Vt. 621, 623 n.3 (1989). But today's decision defeats all of these policies, for it provides an avenue by which prosecutors may avoid the statute of limitations on all lesser-included offenses when there is no time limitation, or a greater one, on prosecution for the greater offense. See 13 V.S.A. § 4501 (setting forth limitations periods for crimes).

162 Vt. at 315 (Johnson, J., concurring).

The concurring opinion is not binding precedent, but it is important precedent in several respects. The majority opinion did not discuss whether a defendant may waive the statute of limitations, but rather appeared to assume without deciding that a defendant may do so. Its narrow holding does not require a conclusion either way. In other words, this court interprets the concurring opinion as the only decisive statement of Vermont law on the issue of whether the limitations period may be waived, even though it commanded only two votes.

The concurring opinion is also persuasive. The opinion emphasizes the plain language of 13 V.S.A. § 4503, which provides that criminal proceedings commenced after the expiration of the limitations period "shall be void." See *State v. Rafuse*, 168 Vt. 631, 632 (1998) (mem.) (explaining that the term "shall" is ordinarily mandatory and imperative). When read in conjunction with the mandatory timeframes imposed by § 4501, the court must conclude that the Legislature meant for prosecutions commenced after the statutory time period to be void, rather than voidable. See *In re Mullestein*, 148 Vt. at 173–74 (explaining general rule that when the Legislature provides a mandatory time period and a consequence for failure to act, the language is mandatory rather than directory, and affects validity of proceedings). Thus, applying the plain language of § 4503 to the untimely prosecutions in this case requires the conclusion that the prosecutions for the offenses of burglary and unlawful restraint are "void."

This interpretation is reinforced by precedent suggesting that the criminal statute of limitations is a substantive restriction on prosecutions commenced after a given date. Once the statute of limitations expires, "a criminal, by grace of the legislature, is granted a right to be free of prosecution despite continuing liability," and the right to freedom from prosecution is "fixed at the time the statute of limitations in effect runs out." *Petrucelli*, 156 Vt. at 384. The policy goal of remaining "free from prosecution" is not met by interpreting the statute of limitations as an affirmative defense which must be raised or waived after the prosecution has already commenced. Instead, the policy goal is better served by interpreting the limitations period as affecting the validity of the proceedings, *Mullestein*, 148 Vt. at 173–74, and as a jurisdictional prohibition upon the power of the state to commence an untimely prosecution in the first instance.

Furthermore, permitting waivers of the statute of limitations would enable prosecutors to avoid the limitations period on all lesser-included offenses for murder and kidnapping. In the context of a kidnapping prosecution commenced under 13 V.S.A. § 2405(a)(1)(E), which prohibits the knowing restraint of a person with the intent to facilitate commission of another crime, this would have the effect of allowing unlimited prosecution for any other crime so long as the facts supported probable cause on the restraint element. Based on the mandatory language of § 4503, the court cannot conclude that the Legislature meant to sanction such a result.

Finally, the legislative amendments to 13 V.S.A. § 2310(b) do not vitiate this reasoning. Those amendments allowed an individual who was originally charged with murder to be convicted of manslaughter as a lesser-included offense even if manslaughter were otherwise barred by the statute of limitations. The amendments represent a permissible extension of the limitations period for manslaughter under certain circumstances, but say nothing on the issue of whether a criminal defendant may waive the statute of limitations in order to limit his sentencing exposure.

The court acknowledges the reasonable policy arguments supporting the State's position, which would bring the substantive right to freedom from prosecution (as afforded by the statute of limitations) in line with constitutional rights designed to protect

the defendant's interests, such as the right to jury trial, which may be waived. But these policy arguments do not accord with the plain language of § 4503, which defines untimely prosecutions as a nullity. There is a significant public interest in applying the criminal statutes as they were enacted by the Legislature, and not as they could have been enacted. *State v. Forcier*, 162 Vt. 71, 74–75 (1994).

For these reasons, the court concludes that the criminal statute of limitations is jurisdictional in Vermont, and may not be waived. The prosecutions and convictions of Mr. Jones for burglary and unlawful restraint were barred by the statute of limitations at the time the prosecutions were commenced, and are therefore void. 13 V.S.A. § 4503. Mr. Jones is not entitled to remain free from prosecution for the offense of kidnapping, however, because the limitations period on that offense has not expired. 13 V.S.A. § 4501(a). Accordingly, the court vacates Mr. Jones' convictions for burglary and unlawful restraint, and remands the case to the Vermont District Court, Windsor Circuit, for further proceedings consistent with this opinion. 13 V.S.A. § 7133. Mr. Jones shall remain in custody pending further proceedings in the Vermont District Court.

This disposition makes it unnecessary to consider Mr. Jones' other arguments in favor of post-conviction relief.

**ORDER**

(1) Petitioner Stewart Jones' Motion for Summary Judgment (MPR #2), filed August 25, 2008, is ***granted***;

(2) Respondent State of Vermont's Cross-Motion for Summary Judgment (MPR #3), filed September 4, 2008, is ***denied***;

(3) Mr. Jones' convictions for burglary and unlawful restraint are ***vacated***;

(4) The case is ***remanded*** to the Vermont District Court for further proceedings consistent with this opinion; and

(5) Mr. Jones shall remain in custody pending further proceedings in the Vermont District Court.

Dated at Woodstock, Vermont this 25 day of November, 2008.

Hon. Harold E. Eaton, Jr.
Superior Court Judge

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