

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
MAY 17 2007
COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)
)
Respondent,)
)
v.)
)
UDON McSPADDEN,)
)
Petitioner.)
_____)

2 CA-CR 2006-0394-PR
DEPARTMENT A
MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20020858

Honorable Peter J. Cahill, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By June Ava Florescue

Globe
Attorneys for Respondent

Marc J. Victor

Chandler
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Petitioner Udon McSpadden was charged by indictment in 2002 with seven counts of sexual conduct with a minor under the age of fifteen years, alleged to have been

committed in the fall of 1985 through 1986. Pursuant to an agreement, McSpadden pled guilty to two counts of attempted sexual conduct with a minor under the age of fifteen, and the trial court sentenced him to a mitigated prison term of five years, to be followed by lifetime probation.

¶2 McSpadden timely filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., in August 2003, within ninety days after he was sentenced, *see* Rule 32.4(a), but inexplicably failed to file a post-conviction petition until May 2006. The trial court summarily denied relief, and this petition for review followed. We review for an abuse of discretion a trial court's ruling on a petition for post-conviction relief, *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), and find no abuse here.

¶3 McSpadden contends the trial court lacked jurisdiction to enter judgment or impose sentence for the convictions, claiming the statute of limitation expired before he was charged with the crimes. We disagree. At the time McSpadden committed the offenses, A.R.S. § 13-107(B) provided:

Except as otherwise provided in this section, prosecutions for . . . offenses [other than homicide, misuse of public monies, or falsification of public records] must be commenced within the following periods after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or such political subdivision which should have occurred with the exercise of reasonable diligence, whichever first occurs:

1. For a class 2 through a class 6 felony, seven years.

1985 Ariz. Sess. Laws, ch. 223, § 1. McSpadden does not dispute that the state was unaware of his crimes until his victim reported them to the Globe Police Department in October 2002 but nevertheless contends that, “[d]espite the language of the statute, requiring actual discovery by the state in order to begin running the statute of limitations is not consistent with the statutory scheme or the legislative history of A.R.S. § 13-107.”

¶4 McSpadden arrives at this confounding conclusion by discussing the meaning of amendments to other sections of the statute that were enacted long after the crimes he committed. He speculates about applying the amendments to factual scenarios completely unlike the one in this case, including ones involving victims with repressed memories and relatively new technology such as deoxyribonucleic acid testing. But, with one exception, none of the subsequent amendments would have had any effect on McSpadden’s case. *See* 2002 Ariz. Sess. Laws, ch. 219, § 6; 2001 Ariz. Sess. Laws, ch. 271, § 1; 1997 Ariz. Sess. Laws, ch. 135, § 1. And the exception simply removed the limitation period altogether from the offenses McSpadden pled guilty to. *See* 2001 Ariz. Sess. Laws, ch. 183, § 1.

¶5 But we need not address factual scenarios not before us nor consider the statute’s legislative history. Although we held in *Taylor v. Cruikshank*, 214 Ariz. 40, ¶¶ 12-13, 148 P.3d 84, 87 (App. 2006), that the language about discovery in § 13-107(B) is unclear, that is not true of the language about *who* must know or discover a crime has been committed. As the trial court observed in denying relief, the statute unequivocally requires that the state or a political subdivision thereof actually have discovered or reasonably should

have discovered a crime has been committed before the limitation period begins to run. *Id.*; see *State v. Jackson*, 208 Ariz. 56, ¶¶ 27, 30, 90 P.3d 793, 801-02 (App. 2004); *State v. Fell*, 203 Ariz. 186, ¶ 6, 52 P.3d 218, 220 (App. 2002) (in interpreting statute, appellate court looks first to plain language of statute and considers “context, history, subject matter, effects and consequences, spirit, and purpose” only if language is unclear).

¶6 McSpadden does not contend the state—in this case, the Globe Police Department—knew that offenses had been committed against the victim any time before October 12, 2002. Instead, he argues it was somehow unfair for the victim to wait until 2002 to report offenses that had occurred in 1985. But, however unfair it might have been to McSpadden for the victim to delay in reporting the offenses, any unfairness is not attributable to the state and does not implicate the statute of limitation.

¶7 McSpadden also contends the state should have discovered the offenses by 1993 at the latest. According to McSpadden, that was when the victim’s parents learned about the offenses, and he apologized to them. In 1993, A.R.S. § 13-3620(A) required “[a]ny . . . parent . . . or any other person having responsibility for the care or treatment of children whose observation . . . of any minor discloses reasonable grounds to believe that a minor is or has been the victim of . . . sexual conduct with a minor” to report the information to a peace officer or child protective services. 1990 Ariz. Sess. Laws, ch. 384,

§ 5.¹ McSpadden concludes that, because the victim's parents were required to report the offenses to the police but did not, their failure somehow means the limitation period in § 13-107(B) expired before the victim reported the offenses to the police herself. We are unable to agree.

¶8 Certainly, if the victim's parents had reported the offenses to the police in 1993, McSpadden would have been subject to criminal prosecution at an earlier time. But the parents' failure to do so, although arguably constituting a class one misdemeanor under the applicable version of § 13-3620, 1990 Ariz. Sess. Laws, ch. 384, § 5, in no way served to impute their knowledge to the state so as to begin the limitation period. Nor did it make the parents some type of state actor. *See State v. Escobar-Mendez*, 195 Ariz. 194, ¶¶ 16-17, 986 P.2d 227, 230-31 (App. 1999) (county hospital is not political subdivision of state for purposes of statute of limitation; knowledge of persons with duty to report imposed by § 13-3620 is not imputed to state).

¶9 We also find no merit to McSpadden's due process arguments. He suggests his case lacked "fundamental fairness" by "oppressive delay" in the state's bringing charges against him. But the state did not delay in filing charges against him, nor were his speedy trial rights implicated. The victim reported the offenses on October 12, 2002, and McSpadden was indicted on December 11, 2002. He pled guilty on April 14, 2003. *See*

¹We note that McSpadden relies on the current version of the statute rather than the version applicable in 1993.

State v. Monaco, 207 Ariz. 75, ¶ 19, 83 P.3d 553, 559 (App. 2004) (preindictment delay means state intentionally delays initiating prosecution to gain tactical advantage over defendant or to harass defendant); *State v. Lemming*, 188 Ariz. 459, 461, 937 P.2d 381, 383 (App. 1997) (speedy trial rights do not attach until state commences prosecution). Like his arguments about the meaning of the statutory language, McSpadden’s due process arguments ignore his own acknowledgment that the state itself was unaware of the offenses until the victim reported them to the police in October 2002, and state action is required for due process considerations to apply.

¶10 Because we conclude the limitation period had not expired at the time McSpadden was indicted and pled guilty, we need not address his arguments that trial counsel was ineffective in failing to argue that it had. And, because we conclude the trial court did not abuse its discretion in denying post-conviction relief, we grant the petition for review but deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge