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CIVIL DIVISION
Case No. 22-CV-03307

Timothy Arbuckle v State of Vermont

Opinion and Order on Cross-Motions for Summary Judgment

In February 2020, Petitioner Timothy Arbuckle pled guilty to a charge of aggravated assault with a deadly weapon, which arose out of an August 2008 incident in which he kicked Mr. Vincent Tamburello, who at the time lay helpless on the ground after having been fatally shot by Mr. Kyle Bolaski.[1] Mr. Arbuckle received the agreed upon sentence of 5–12 years, all suspended except 3 years to serve. Currently, he is incarcerated after having violated probation conditions, with a projected release date in 2028. In this case, he asks the Court to vacate his conviction and sentence, arguing that they are void because the aggravated assault charge came long after the applicable 3-year limitation period, 13 V.S.A. § 4501(e), had expired. The State opposes any such relief, arguing that the prosecution against Mr. Arbuckle was commenced in a timely manner. The parties have filed cross-motions for summary judgment addressing this matter. The Court makes the following determinations.

I. The Summary Judgment Standard

Summary judgment procedure is "an integral part of the . . . Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every

[1] At the same time, he pled guilty to violating conditions of release in two other criminal cases. Those convictions are not at issue here. For more on the criminal case against Mr. Bolaski, *see State v. Bolaski*, 2014 VT 36, 196 Vt. 277.

action.'" *Morrisseau v. Fayette*, 164 Vt. 358, 363 (1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991). Speculation is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10, 210 Vt. 375, 380. Where, as here, there are cross-motions for summary judgment, the parties opposing summary judgment "are entitled to the benefit of all reasonable doubts and inferences." *Montgomery v. Devoid*, 2006 VT 127, ¶ 9, 181 Vt. 154, 156.

II. Undisputed Material Facts

Mr. Arbuckle kicked Mr. Tamburello in August 2008 after he had been shot by Mr. Bolaski but before he had died. In January 2009, the State charged Mr. Arbuckle with simple assault. In May 2012, the State amended the charge to aiding in the commission of aggravated assault (3-year limitation period). Mr. Arbuckle sought dismissal of the amended charge as untimely filed. In response, in January 2014, the State amended the

charge to accessory to second degree murder, which is not subject to a limitation period, for his alleged role in orchestrating the events that led up to Mr. Tamburello's shooting death. Due to the amendment, the criminal court denied the motion to dismiss as moot. In February 2020, as part of a plea agreement, the State amended the murder charge to aggravated assault with a deadly weapon (his cleated foot), 13 V.S.A. § 1024(a)(2), for kicking Mr. Tamburello. Mr. Arbuckle pled guilty and was sentenced as described above.

III. Analysis

There is no dispute that the limitation period for aggravated assault with a deadly weapon is 3 years under 13 V.S.A. § 4501(e), and that the limitation period began to run from the time of the commission of the offense (August 2008). The controversy is over when the prosecution of Mr. Arbuckle should be deemed to have "commenced" under § 4501. Mr. Arbuckle defines that point in time in relation to the specific charged violation for which he was convicted, aggravated assault with a deadly weapon. In his view, he was first charged with that offense in February 2020, long after the 3-year limitation period had expired, rendering the conviction void.

The State, instead, looks to the earliest time at which *any* prosecution against Mr. Arbuckle was initiated, regardless that the initial charge was serially amended to arrive (eventually) at the one to which Mr. Arbuckle pled guilty. In the State's view, the prosecution against Mr. Arbuckle was commenced no later than the filing of the information charging him with simple assault in January 2009, well within the 3-year limitation period for the eventual charge of aggravated assault with a deadly weapon. As a result, that latter charge was also timely filed. In other words, as the State sees it, timeliness under 13 V.S.A. § 5401 as to any amended charge, whenever brought, will

always be measured by two fixed points in time: when the offense was committed and when the prosecution for the first charge was commenced against the defendant.

In the alternative, the State argues that the Court should treat the original charge as tolling the limitation period as to the final amended charge because both were predicated on the same general factual narrative described in the affidavit of probable cause, and, thus, there was no unfair surprise. Mr. Arbuckle objects that the series of amendments were substantive, not technical, and tolling would not be inappropriate.

Relevant Vermont statutes do not expressly answer the question posed in this case. Unless a limitation period set forth in 13 V.S.A. § 4501(a)–(d) or elsewhere in Vermont statutes more specifically applies, "*[p]rosecutions* for . . . felonies and for misdemeanors shall be *commenced* within three years after the commission of the offense, and not after." 13 V.S.A. § 4501(e) (emphasis added). As noted, there is no dispute that aggravated assault falls under § 4501(e).

"Commenced" is defined as follows:

> For the purpose of determining whether a period of limitation prescribed by law has run, a prosecution for a felony or misdemeanor shall be deemed commenced upon the occurrence of the earliest of the following events:
>
> (1) the arrest of the defendant without warrant;
> (2) the issuance to him or her by a law enforcement or prosecuting officer of a citation to appear; or
>
> (3) the presentation of an information or indictment to a judicial officer for the purpose of obtaining a summons or arrest warrant.

13 V.S.A. § 4508. Per the statute, commencement involves an arrest, citation, or initial of prosecution relating to "a felony or misdemeanor." The question, then, is which felony or misdemeanor is the proper focus—any felony or misdemeanor, subject to amendment,

as the State advocates; or only the specific felony or misdemeanor that has been challenged as being brought beyond the proper limitations period?

One answer to this question is that § 4501 generally establishes the different limitation periods by reference to "prosecutions for" identified offenses. As a result, commencement under § 4508 must refer to the commencement of prosecutions for specific offenses. The structure of the statute strongly implies that it is concerned not merely with the fact that one is being prosecuted generally, but that notice to the defendant of the charge for which she or he is being prosecuted is essential. *See U.S. v. Gengo*, 808 F.2d 1, 3 (2d Cir. 1986) ("notice to defendants is at the core of the limitations doctrine").

The Vermont case that most nearly addresses the question presented is *State v. Stewart*, 140 Vt. 389 (1981). Robert and Irene Stewart had been indicted by grand jury for embezzlement and aiding in the commission of embezzlement, respectively. Both indictments were dismissed for curable reasons. Subsequently, the State "recharged" both defendants by information with the same charges as in the indictments. For the first time, however, it also charged Irene with her own act of embezzlement. On appeal, the question was whether the dismissed indictments, so long as they had been operative, tolled the limitation period. If not, the latter charges were out of time as the limitation period would have lapsed between the filing of the grand jury indictments and the informations.

In analyzing whether the prosecution was timely, notice to the defendants was the Vermont Supreme Court's primary consideration. It essentially ruled that, where the latter charge is substantially the same in substance as the former charge, the former

charge tolls the limitation period for purposes of the latter. The Court concluded that the indictments tolled the limitation period, but *only for the charges appearing in the indictments*: "The indictments against both defendants stated, at the very least, what statutes were violated, when they were violated, and what acts of the defendants resulted in the violation." *Stewart*, 140 Vt. at 398. Modifications that do not substantially change the nature of the offense charged in the subsequent information are subject to tolling. Charging a new offense, though, is not subject to tolling and must meet the applicable limitation period as an independent matter. On that basis, it determined that the new charge against Irene was barred by the statute of limitations.

For this analysis, the Court relied on *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976). The *Stewart* Court quoted this passage from *Grady*:

> This argument misconceives the interplay of an indictment with a statute of limitations. Once an indictment is brought, the statute of limitations is tolled *as to the charges contained in that indictment*. This is a sensible application of the policies underlying statutes of limitations. The defendants are put on timely notice, because of the pendency of an indictment, filed within the statutory time frame, that they will be called to account for their activities and should prepare a defense. The statute begins to run again *on those charges* only if the indictment is dismissed, and the Government must then reindict before the statute runs out.

Stewart, 140 Vt. at 398 (*quoting Grady*, 544 F.2d at 601 (emphasis added, citations and footnotes omitted). It then said, "We agree with this analysis and feel that it applies exactly to the present case." *Stewart*, 140 Vt. at 398.

In *Grady*, the defendants were indicted with numerous firearms charges just before the 5-year limitation period would have expired. *United States v. Grady*, 544 F.2d 598, 601 (2d Cir. 1976). The original indictment was never dismissed. On the eve of trial, however, the United States filed a superseding indictment. On appeal, the

defendants argued that the superseding indictment had come too late as the limitation period had expired. This prompted the quoted portion of the Circuit Court decision above, which was immediately followed by this: "Since the statute stops running with the bringing of the first indictment, a superseding indictment brought at any time while the first indictment is still validly pending, *if and only if it does not broaden the charges made in the first indictment*, cannot be barred by the statute of limitations." *Id*. at 601–02 (emphasis added, footnote omitted). The Court examined the two indictments and concluded that the superseding one merely consolidated and narrowed the prior one. On that basis, it rejected defendant's statute of limitations argument.

The analyses set out in *Stewart* and *Grady* suffice to dispose of, at least, part of the State's argument in this case. In the Court's view, *Stewart* wholly forecloses the State's contention that *any* amended charge will *always* be timely if some initial charge was timely commenced.

Otherwise, the question under *Stewart* turns to whether the amendments in this matter were technical or innocuous, keeping the limitation period tolled, or whether they broadened or substantially changed the initial charge. Viewed in this light, it is apparent that the limitation period for aggravated assault expired long before Mr. Arbuckle pled guilty to it.

Initially, Mr. Arbuckle was charged with simple assault for kicking Mr. Tamburello. That charge was brought in a timely manner. The State then filed an amended information charging him, instead, with *aiding* in the commission of aggravated assault. It is not clear on the face of the amended information what conduct this related to, but, presumably, it was not for kicking Mr. Tamburello because Mr.

Arbuckle was the principal actor for the kick. The amendment, therefore, clearly changed the substance of the charge, the underlying factual basis for it, and elevated its seriousness considerably. The original simple assault charge could not have tolled the limitation period for this claim. Indeed, the State appears to have avoided dismissal on that basis in 2012 only by filing another amended charge, aiding in the commission of murder, for which tolling was irrelevant because no limitation period applied. There is no allegation in the supporting affidavits that the kick, however vicious and cruel, played any causal role in Mr. Tamburello's death. The State's focus was on the alleged planning and coordination of the attack on the victim.

It was about 6 years later and roughly 11 years after the simple assault charge was first brought, that the case returned specifically to the kick, though this time the charge was aggravated assault with a deadly weapon, a far more serious charge with different legal elements and factual bases than the original simple assault charge. The State has not attempted any serious showing in this case as to how this series of fundamentally different charges—from simple assault to aiding an aggravated assault to aiding a murder—possibly could have tolled the limitation period throughout so as to preserve the timeliness of an eventual aggravated assault with a deadly weapon charge. Nor does the Court perceive a way to do so. The amendments did not simply narrow the original charge or sharpen its focus. The substance of the charge against Mr. Arbuckle plainly changed *considerably* over the years. Under the reasoning of *Stewart*, the eventual charge to which he pled guilty was brought in clear violation of 12 V.S.A. § 4501(e).

The State's remaining contention is that the Court should adopt what it deems to be the "relation-back doctrine" followed by some federal courts in this context. The Court has reviewed the cases cited by the State and does not believe that they create a path around the analysis set out above or that they aid the State's argument. *See generally U.S. v. Salmonese*, 352 F.3d 608 (2d Cir. 2003); *U.S. v. Pearson*, 340 F.3d 459 (7th Cir. 2003); *U.S. v. O'Bryant*, 998 F.2d 21 (1st Cir. 1993); *U.S. v. Lash*, 937 F.2d 1077 (6th Cir. 1991); *U.S. v. Pacheco*, 912 F.2d 297 (9th Cir. 1990); *U.S. v. Schmick*, 904 F.2d 936 (5th Cir. 1990); *U.S. v. Italiano*, 894 F.2d 1280 (11th Cir. 1990); *U.S. v. Gengo*, 808 F.2d 1 (2d Cir. 1986); *U.S. v. Charnay*, 537 F.2d 341 (9th Cir. 1976). In each of these cases, the Court applied the same type of analysis that the *Stewart* Court imported from *Grady*, and in each an original indictment was readily found to have tolled the limitation period for purposes of a superseding indictment based on that approach. Not one of them features anything similar to the sort of serial amendments that occurred here, which substantially and repeatedly changed the nature of the charge and the underlying factual basis for it. Moreover, none of the cases approved (or addressed at all) the State's implied argument that the only charging informations that matter in this case are the first and the last, without any consideration of the those in the interim. If anything, the cases cited by the State demonstrate the sharp contrast between an amended charge properly subject to tolling because it is substantially the same as its timely predecessor, and the far different circumstances of this case.

Lastly, Mr. Arbuckle's plea to a time-barred charge did not waive this timeliness defect. In *In re Jones*, 2009 VT 113, 187 Vt. 1, the Court considered whether a plea to an otherwise time-barred charge operates to waive the time-bar. At the time of *Jones*, 13

V.S.A. § 4503 stated without exception: "If a prosecution for a felony or misdemeanor, other than arson and murder, is commenced after the time limited by section 4501 or 4502 of this title, such proceedings shall be void." The prosecution of Mr. Jones for kidnapping had been commenced in a timely manner. However, he pled guilty to amended charges that were known to all to have been time-barred when the kidnapping charge was brought. In fact, he "knowingly, intelligently and voluntarily waived such [limitation] rights orally" at the change-of-plea hearing. *Id.*, 2009 VT 113, ¶ 3, 187 Vt. at 3. Despite the waiver, construing § 4503, the Court determined that the conviction remained void: "In effect, he pled guilty to offenses for which there could be no judgment of conviction." *Id.*, 2009 VT 113, ¶ 11, 187 Vt. at 7. In so ruling, the Court explained that "all criminal prosecution proceedings are void when the applicable statute of limitations *for the charged crime* has run." *Id.*, 2009 VT 113, ¶ 9, 187 Vt. at 6 (emphasis added). Mr. Jones was entitled to postconviction relief on that basis.

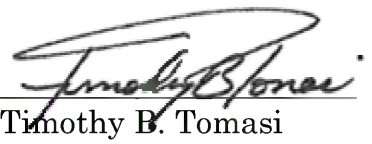
In this case, the undisputed facts are clear: Mr. Arbuckle pled guilty to an amended charge that was long out of time under 13 V.S.A. § 4501(e). That conviction is void under 13 V.S.A. § 4503(a) (which is the same provision that was at issue in *Jones*). Unlike at the time of *Jones*, however, an amendment to § 4503 now expressly permits waivers of limitation periods as follows: "If a defendant knowingly and voluntarily waives the statute of limitations in writing and with the consent of the prosecution, the court shall have jurisdiction over the offense and the proceedings shall be valid." 13 V.S.A. § 4503(b). There is, however, no such written waiver of any limitation period in this case,

and the State does not take the position that there was a waiver. Mr. Arbuckle's conviction is void under 13 V.S.A. § 4503(a) and *Jones*.[2]

IV. Conclusion

For the foregoing reasons, Mr. Arbuckle's motion for summary judgment is granted, and the State's is denied. Mr. Arbuckle's conviction and sentence for aggravated assault with a deadly weapon must be vacated. The Court is unclear, however, as to the status of the underlying criminal action, as to the status of the prior charge that was dismissed as part of the plea agreement that has now been overturned, as to whether the State intends to attempt to proceed with a prosecution, as to whether any conditions of release may arguably remain in place, and whether a remand to the Criminal Division is appropriate. Accordingly, per Vt. R. Civ. P. 58, the Court asks Plaintiff to prepare and serve a proposed form of judgment.

Electronically signed on Friday, April 28, 2023, pursuant to V.R.E.F. 9(d).



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Timothy B. Tomasi
Superior Court Judge

[2] Nor does it make any difference that Mr. Arbuckle did not raise this matter in the criminal case. *See State v. Caron*, 2020 VT 96, ¶ 13, 213 Vt. 419 ("[E]ven if defendant was aware of the statute-of-limitations issue . . . the State has provided no authority for its apparent position that defendant was under some obligation to come forward and point out to the State, in the minutes before trial, that its prosecution on the amended charge was barred by the statute of limitations. We are aware of no decision, and have been pointed to none, requiring defendant to assist the State in this fashion."); *State v. Delisle*, 162 Vt. 293, 315 (1994) (Johnson, J., concurring) ("[I]n Vermont, the statute of limitations is not simply an affirmative defense that defendant may waive if he chooses.").