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ISSUES OF TIME

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Updated September 30, 2017

ISSUES OF TIME

TIME FRAMES (3.140 (d)(3)):

McLean v. State, 2015 WL 2393311 (Fla.App. 4 Dist.)

> Defendant's conviction for one count of lewd and lascivious battery upon 14-year-old victim was not supported by competent, substantial evidence, where there was no evidence that the defendant committed lewd and lascivious battery on the victim during the time period alleged in the count and, at best, the State's evidence showed the defendant and the victim were involved in some kind of relationship during that time period when she went to his house several times and took non-explicit photos of him.
>
> Defendant was charged with lewd and lascivious battery on the victim on or between August 13, 2011, and December 31, 2011. The victim testified at trial she first had sex with the defendant on January 5, 2012. The court subsequently ruled that the conviction for that count was not supported by competent and substantial evidence.

Easterly v. State, 22 So.3d 807 (Fla. 1st DCA 2009):

> State sufficiently exhausted all reasonable means of narrowing timeframe of sexual abuse alleged in indictment; State made it clear that crime with which it was charging defendant was one that led to minor's pregnancy, although State knew specific date of one incident of sexual abuse, it could not be certain that this incident was one that caused pregnancy, at same time, State could not be certain that this incident did not cause pregnancy, for this reason, it would have been improper for State to charge defendant with two separate crimes based on both pregnancy and known incident, and to be sure timeframe alleged in information captured act that led to pregnancy, State needed to expand it beyond known date.

McGee v. State, 19 So.3d 1074 (Fla. 4th DCA 2009):

> Evidence was sufficient to show that unlawful sexual activity with a minor occurred in the timeframe alleged in the information, which was on or between the first day and the seventh day of a particular month, where victim testified that she had a sexual encounter with defendant "about a week and a half to two weeks" before an incident on the fourteenth day of the month.

Jones v. State, 944 So.2d 533 (Fla. 5th DCA 2006):

> State did not show clearly and convincingly that it had exhausted all reasonable means of narrowing the 30-month time frame set forth in information charging defendant with lewd and lascivious molestation of a minor, and thus, upon proper motion, trial court was required to dismiss the information with leave for state to amend the information upon exhausting all reasonable means of narrowing the time frame further; state contended the victim was unable to be more specific with regard to dates of alleged incidents, but, during first trial, prosecutor did not even ask the victim the dates on which alleged improper touchings occurred.

Bell v. State, 930 So.2d 779 (Fla. 4th DCA 2006):

> Fact that state elected to proceed at beginning of trial on its "refile information," as modified by bill of particulars, rather than on its subsequently filed "amended information" did not prejudice defendant, and thus dismissal of charges was not warranted; by trying case under modified "refile information," state stayed within reduced time period set forth in bill of particulars, none of the evidence at trial strayed from reduced time period, and state did not attempt to convict defendant of acts committed outside that time span.

Coderre v. State, 883 So.2d 385 (Fla. 4th DCA 2004):

> No error in denying motion for judgment of acquittal based on state's failure to show that act on which charge was based was committed during time frame alleged in information.
>
> Defendant has not asserted that he was in any way surprised or hampered in preparing his defense, and other safeguards established by Florida Supreme Court in *Tingley v. State* were met.

Sanchez v. State, 875 So.2d 1285 (Fla. 3rd DCA 2004):

> No merit to claim that trial court's refusal to require state to narrow time frame alleged in information mandated dismissal of charges. Record demonstrates neither an ability on state's part to further narrow time frame nor likelihood of any prejudice to defendant flowing from inability to narrow time frame.
>
> Discussion: A very brief opinion.

Gamble v. State, 870 So.2d 110 (Fla. 2d DCA 2003):

> Conviction reversed where victim's testimony was insufficient to prove commission of the crime during the period alleged in the information.

Discussion: The victim vaguely testified that the last time the touching took place was when she was 8 or 9. The second count of the information charged lewd molestation which took effect October 1, 1999. Since the victim turned 9 on April 27, 1999 there was insufficient evidence that the act took place after the effective date of the statute, which was charged in the information.

Alonso v. State, 834 So.2d 885 (Fla. 3d DCA 2002):

Trial court properly declined to dismiss information charging sexual battery on a minor and lewd, lascivious, indecent assault upon a child on ground that it did not specify exactly when the offenses.

State was properly allowed to charge offense within a date range.

Mathuus v. State, 776 So.2d 1090 (Fla. 4th DCA 2001):

No merit to claim that state failed to prove that any of charged sexual batteries to child victim occurred within time periods alleged in each count of information when child when child testified how old she was when each of the sexual batteries occurred.

State v. Generazio, 691 So.2d 609 (Fla. 4th DCA 1997): Judge Carney

In view of evidence that sexual abuse at issue occurred daily over more than eight-month period and that victim testified that he was unable to remember specifically when certain acts happened and could only testify that the acts of abuse occurred every day, it was apparent that state could not narrow time frame in which acts of child abuse alleged in dismissed counts occurred nor could it identify any separate acts.

In a case of ongoing sexual abuse of a child, where the child is unable to remember the specific dates on which he or she was abused, the allegation that the act occurred "on one or more occasion" is not per se, duplicitous.

Discussion: The 4th DCA said "Before trial commenced, the trial court directed the attention of both the state and the public defendant to *Fountain v. State*, 623 So.2d 572 (Fla. 1st DCA 1993). The court informed them that it understood *Fountain* to mean that it was error for the state, in a single count, to charge two separate and distinct offenses that may be subject to different punishments…The trial judge erred when he applied *Fountain* in this case."

The appellate court looked to other states when it analyzed the problem of prosecuting sexual offenses on children. The court noted that most other states recognize that child molestation is, by its very nature, a continuous course of criminality rather than a series of successive crimes. "They have allowed the

matter of how to charge these sensitive and difficult-to-define acts of sexual abuse to rest in the discretion of prosecutors." This reasoning may also help us with statute of limitations problems. Since some child abuse charges are ongoing offenses, the case should be used in those cases also.

Audano v. State, 674 So.2d 882 (Fla. 2d DCA 1996):

When a bill of particulars narrows the time within which the crime occurred, and the prosecution fails to show the defendant committed the offense within that time frame, a conviction on the charge must be reversed.

Discussion: The charged that the defendant committed sexual battery on the victim by placing his tongue on her vagina "beginning on or about the 3rd day of May, 1991, through the 4th day of July, 1991…" Upon request by the defense, the State filed a bill of particulars alleging the same dates. The victim testified that the act took place after July 4th, 1991. Please note that the date of the offense is not typically an element that needs to be proved, but when a bill of particulars is requested, the date becomes a necessary element to prove.

Wykle v. State, 659 So.2d 1287 (Fla. 5th DCA 1995):

No error in denying motion for judgment of acquittal as to count in which dates alleged in charging instrument varied from dates proven at trial where crime was committed before return date of charging instrument, crime was committed within applicable statute of limitations, and there was no showing that defendant was prejudiced by variance.

Discussion: The defendant was charged with 10 counts of sexual battery on a child. Count I charged the defendant with committing a sexual battery on the child between the dates of July 1, 1991 and August 31, 1991. At trial the child testified that the sexual battery charged in this count occurred between March 1, 1993 and March 31, 1993. After her testimony, the State was permitted to amend the information to read that the offense occurred between July 20, 1992 and October 31, 1992. These new dates still did not conform to the child's testimony. Since defense counsel failed to articulate any prejudice in the dates charged, the appellate court upheld the conviction.

Dell'Orfano v. State, 616 So.2d 33 (Fla. 1993):

Trial court on proper motion is required to dismiss information or indictment involving lengthy periods of time if State in a hearing cannot show clearly and convincingly that it has exhausted all reasonable means of narrowing time frames further. Where such showing is made, burden then shifts to defendant to show that defense more likely than not will be prejudiced by the lengthy time frame, through presentation of evidence and argument showing that charges as framed

will hinder ability to raise alibi and other defenses.

To eliminate risk of improper multiple prosecutions for the same offense from prosecutions based on charging instruments involving lengthy periods of time, after defendant has been acquitted or convicted of any offense that was or could have been the subject of hearing at which State can show that it has exhausted all reasonable means of narrowing time frames further. Double jeopardy violation will be presumed when State attempts a successive prosecution, to extent that prosecution involves the same defendants and the same crimes against identical victims and periods of time overlapping or subsumed within those periods included in the prior charging instrument. To overcome that presumption, State must clearly and convincingly demonstrate that the newly charged offenses are genuinely distinct from those previously charged, and in this regard its due diligence may be an issue in close cases.

Wherever there is doubt that State has met its burden of clearly and convincingly demonstrating that newly charged offenses are genuinely distinct from those previously charged in instrument involving lengthy periods of time, trial court must find double jeopardy bar if it also concludes that State was either aware of or could have discovered the newly charged offenses through due diligence in the first prosecution; however, lack of due diligence would not be dispositive where State clearly and convincingly can demonstrate distinctness of the offense.

Trial court should not have applied per se rule of reversal and dismissed information charging defendant with sexual battery and other counts of assault on a child based entirely on the twenty seven month time span of the instrument, without giving State the opportunity to show clearly and convincingly at hearing that it had exhausted all reasonable means of narrowing the time frames further.

Discussion: This is the definitive case on this subject. This decision overrules both the Knight, and the Goble, decisions listed below. The Court refuses to adopt a bright line test as to when a period of time is so lengthy as to require a hearing. It also notes that the fact that a defendant may advance an alibi of short duration will not necessarily be dispositive where it is clear the defendant had access to the victim throughout the time periods in question such as where both resided in the same house at all relevant times. The State worded its information as "on one or more occasions between the 1st day of August, A.D. 1985 and the 30th day of June, A.D. 1988 inclusive." The case is currently on Appeal again based on the propriety of this language. We can thank judge Carney for helping us clarify these often debated issues. We can also thank the Supreme Court for disagreeing with him.

State v. Dell'Orfano, 592 So.2d 338 (Fla. 4th DCA 1992):

Information charging defendant with sexual battery and other counts of assault on

a child over time frame of two and one half years did not per se require dismissal of information even in the absence of specific prejudice to defendant, under either rules or due process, assuming State made good effort to further narrow time period.

Discussion: This case was affirmed by the Florida Supreme Court in the above opinion. I have included the 4th DCA opinion to give the reader a better feel for the progression of the case. The State first charged the defendant with sexually abusing his daughter over a three year period. The State later reduced the time period to two and one half years. The trial court made a finding that the State made a good faith effort to narrow the time frames as much as possible. The defendant argued that the information must be dismissed pursuant to FRCP 3.140(d)(3) and 3.140(o). The trial court (Judge Carney) dismissed the information as a matter of law and the 4th DCA overruled it. The 4th DCA reviewed several appellate decisions on the same issue and distinguished them. The court apparently relies heavily on the State's efforts to narrow the time frames as much as possible. This is a excellent case with which to familiarize yourself. It will help you distinguish most cases cited by the defense.

State v. Theriault, 590 So.2d 993 (Fla. 5th DCA 1991):

Evidence Supported trial court's findings, that state violated rules of discovery by failing to set forth in information, amended information, and statement of particulars more specific time frames in which alleged sexual abuse occurred when State had ability to be more specific and that violations were willful., but dismissal of information was not the proper sanction, as defendant had not suffered actual prejudices as result of prosecutor's misconduct and alternative sanctions were available.

Discussion: This case involves a look from a different angle at the time frame issue. The defense counsel first moved to dismiss by alleging that time frames were too long. When that did not work, he moved for a speedy trial. Eventually, the State amended the information to include narrower dates and the defense objected that it was a discovery violation. This is a good case to review in case a defense attorney tries this angle of attack. Since the Supreme Court's Dell'Orfano decision, a straight up attack on the time frames has become difficult for the defense. It is now more likely that they will try attacks as the one in the instant case.

Morton v. State, 548 So.2d 788 (Fla. 2d DCA 1989):

Defendant's convictions for lewd and lascivious conduct were improper where information and jury instructions based those charges on same conduct on which defendant's conviction for sexual battery were based, even if defendant's convictions for the two crimes could have been supported by different conduct.

State v. Bandi, 338 So.2d 75 (Fla. 4th DCA 1976):

> Where information alleged indecent assault on a nine year old between April 1, 1974 and February 16, 1975, where a statement of particulars narrowed the date to a period of March 1 to June 1, 1974, and where the state attorney said he could not further refine the time span, there was compliance by the state with both the requirement of the bill of particulars and the requirement of due process, and the State did not have the burden of showing what it had done toward narrowing the time requirement.
>
> Exact time is not an element of an offense and defendant cannot so make it by presenting a "possible defense of alibi."
>
> An information or bill of particulars may properly charge a crime between two dates.

State v. Sparks, 273 So.2d 74 (Fla. 1973):

> Reason for requiring a definite date in an indictment or information is to show that the prosecution is not barred by the statute of limitations.
>
> It is not essential that date of the offense proved at trial be the date stated in the indictment or information.
>
> Indictment or information alleging the commission of an offense "on or about" a stated date is not fatally vague in the absence of a showing that time is material to the crime charged or that the accused is prejudiced by the use of the phrase; overruling previous contrary decisions.

Other Cases:

Valid:

State v. Yzaguirre, 569 So.2d 492 (Fla. 2d DCA 1990):

> "March 10, 1968 to March 10, 1970 and March 10, 1970 to March 10, 1971"

State v. Jones, 539 So.2d 535 (Fla. 3d DCA 1989):

> 11 months.

Lightbourne v. State, 438 So.2d 380 (Fla. 1983):

> 22 1/2 hours. A homicide case with good legal analysis.

Invalid:

State v. DeBianchi, 538 So.2d 984 (Fla. 4th DCA 1989):

6 years and 4 1/2 years. See Dell'Orfano for discussion.

State v. Goble, 535 So.2d 706 (Fla. 5th DCA 1988):

2 years and 8 months. (Overruled by Dell'Orfano)

State v. Garcia, 511 So.2d 714 (Fla. 2d DCA 1987):

2 years and 15 days.

Knight v. State, 506 So.2d 1182 (Fla. 5th DCA 1987):

4 years on Count I and 3 years on Count II. (Overruled by Dell'Orfano)

"ON ONE OR MORE OCCASIONS"

Stalker v. State, 2017 WL 2859228 (Fla.App. 4 Dist., 2017)

The State charged the defendant as follows: "[o]n or between November 1, 2010 to December 23, 2013, [Stalker] ... on one or more occasions, did unlawfully commit sexual battery, to wit: vaginal penetration ...." The defendant never challenged the Information, but after trial he objected to the manner of charging and said it was fundamental error. He argued that it allowed the jury to convict on a non-unanimous verdict.

The appellate court said it was not fundamental error and cited several cases that say the State is allowed to charge in this manner in child sexual abuse cases.

Geiser v. State, 36 Fla. L. Weekly D2689 (Fla. 4th DCA 2011):

State's use of "on one or more occasions" in criminal information charging defendant with eight counts of sexual battery afforded defendant sufficient notice of specific criminal acts with which he was charged; minor victims could not pinpoint specific dates when acts occurred, although they could identify their ages when acts occurred, specific acts themselves, and where they took place, and state

separated counts based upon ages of victims at different points in time and specific acts perpetrated.

Ramos v. State, 36 Fla. L. Weekly D2735 (Fla. 4th DCA 2011):

> Evidence was insufficient to support a conviction for indecent assault during the one-month period alleged in the information for that offense, even though victim testified that defendant constantly sexually molested and battered her from the time she was in third grade until just before her twelfth birthday and that she recalled that the abuse began after a baby shower for her sister's godmother; victim acknowledged on cross examination that she did not remember exact dates and that the state selected the first day of the alleged one-month period as the first possible date on which the offense occurred, and the state did not introduce any evidence as to when the baby shower occurred.
>
> In child molestation and sexual abuse cases, the law will permit vagueness with respect to the actual dates in which the crimes occurred for a general allegation, i.e., a single count covering a period in which one or more incidents of illegal activity is alleged to have occurred, but greater specificity is required as a foundation for individual counts.

Cooper v. State, 13 So.3d 147 (Fla. 2d DCA 2009):

> State charged defendant with committing sexual offense upon a child between two dates. At trial, the State introduced evidence that the defendant committed multiple acts during the charged time period. The appellate court ruled that the State should have either used the phrase "on one or more occasions" or filed a Williams Rule notice. Since the State did neither, it was in error. Thankfully it was ruled a harmless error.

James v. State, 973 So.2d 1194 (Fla. 2d DCA 2008):

> Defendant's objection to anticipated testimony of victim, on grounds that she intended to testify to multiple acts of digital penetration when defendant had been charged with one single offense, was premature and, thus, appropriately denied, where, at the time of defendant's objection, victim had not discussed the acts in question.

Skully v. State, 736 So.2d 730 (Fla. 2d DCA 1999):

> Estimates of the number of incidents of sexual battery and lewd and lascivious conduct failed to support convictions on counts in addition to crimes that the victim specifically remembered and recounted; although vagueness could be

inherent in cases involving methods of abuse which could not be traced to individual counts, greater specificity was required.

Discussion: The State charged the defendant with 28 counts, but the victim only had a specific recollection as to three of them. The other 25 counts basically represented estimates of how many times the victim had been sexually abused in various ways. The court ruled that this manner of charging the defendant is simply not sufficient enough. It would have been better for the State to charge three separate counts reflecting the specific memory of the victim and a few more counts charged "on one or more occasions" to reflect the various different types of sexual activity.

State v. Dell'Orfano, 651 So.2d 1213 (Fla. 4th DCA 1995):

Dismissal of information charging sexual battery upon child and indecent assault on ground that individual counts alleged multiple incidents over twenty seven month period reversed and remanded to give state opportunity to amend. Where it is reasonable and possible to distinguish between specific incidents or occurrences of offense, each separate occurrence should be contained in separate count of the accusatory document. Error to dismiss charges on ground that state could have narrowed time frame of charges and failed to do so where state showed clearly and convincingly that it exhausted all methods of narrowing the time frame.

Discussion: This Judge Carney case is weaving its way through the appellate highway for the second time on a second issue. The case was initially dismissed because the time frames were too long. The issue went to the Florida Supreme Court which overruled the judges decision and stated that there is no per se limit on time frames that can be used. The instant case deals with the issue of charging multiple crimes in one count (on one or more occasions between...) The 4th DCA basically ruled that if the victim *can* relate a specific number of incidents, it *must* be charged as multiple counts. If the victim cannot possibly recall the number of occasion, it can be charged in one count.

Cornelius v. State, 448 So.2d 86 (Fla. 2d DCA 1984):

Evidence was insufficient to support conviction on fourteen of fifteen counts of lewd assault, where victim could not remember when or how often assaults subsequent to the first occurred, or whether assault occurred more than once.

Discussion: The State charged the defendant in this case with one lewd assault for each month from December 1979 through January 1981, inclusive. This case presents a problem we encounter frequently. The victim cannot remember detailed events, but says it happened about once a week for five years. We are then places in the position of charging either "on one or more occasions" or one

count for every week in the time period. If the victim cannot recall specifics of each charged count, they may be dismissed. Although this case represents a situation where the victim could not remember anything (and thus distinguishable) it may be cited by the defense to argue against charging in this manner.

STATUTE OF LIMITATIONS:

Curry v. State, 2017 WL 3888037 (Fla.App. 4 Dist., 2017)

Defendant committed lewd molestation on child in 2004. The child reported the act to DCF in 2006. Law enforcement was notified in 2009 and an information was filed in 2010. The three year statute of limitations began running in 2006 when the child told a DCF worker and therefore, the 2010 information violated the statute of limitations.

Guzman v. State, 2016 WL 7403670 (Fla. Dist. Ct. App. Dec. 21, 2016)

This case provides a good discussion of the pitfalls inherent in re-filing cases after the expiration of the statute of limitations. The court used the term "amended information" as opposed to "re-file" even though new charges were added. Language from the opinion is inserted below to provide guidance on the issue:

> *A "subsequently filed information, which contains language indicating that it is a continuation of the same prosecution, timely commenced will not be considered an abandonment of the first information and therefore will not be barred by the statute of limitations." Rubin, 390 So.2d at 324. However, where the state has "brought a new charge, alleging a new and distinct crime with different elements, under a completely different statute," the statute of limitations requires dismissal of the new charge.*
>
> *It is true that the "state may amend the charging document to correct the error after the applicable statutory period has elapsed." M.F. v. State, 583 So.2d 1383, 1386 (Fla. 1991). However, such an amendment may not actually change the substantive charge and may not prejudice the rights of the defendant. Id. Where a more serious, amended charge alleges an act not originally charged, then the amended charge must independently satisfy the statute of limitations. Bongiorno v. State, 523 So.2d 644, 645 (Fla. 2d DCA 1988*
>
> *Had the crimes in the original and amended information been identical, there would have been a continuation of the charge, and no limitations bar. Rubin, 390*

> *So.2d at 324. However, where there is "nothing in the last information to link it with the first," the state is deemed to have abandoned the original information, see Fridovich v. State, 562 So.2d 328, 330 (Fla. 1990), and the amended information will be subject to the statute of limitations bar. The initial information did not charge an offense in Count 1. The amended information Count 1 contains allegations different from the initial information Count 1, constituting a new charge. Rubin, 390 So.2d at 324. The new charge filed beyond the statute of limitations was barred.*

Smith v. State, 2016 WL 7403663 (Fla. Dist. Ct. App. Dec. 21, 2016)

Defendant could raise statute of limitations for the first time on direct appeal after he was convicted at trial for an offense barred by statute of limitations. *Certified to Florida Supreme Court*

A plea to a lesser offense which is barred by statute of limitations waives future objections.

Court cannot give a lesser included offense to the jury at trial which is barred by statute of limitations unless defendant affirmatively states on record that he understands the nature of the right he is waiving.

Discussion: This case provides a very thorough discussion of these statute of limitations issues.

Brown v. State, 2015 WL 7266557,(Fla.App. 4 Dist.,2015)

This case provides a good discussion of how the statute of limitations applies to sex offenses. The following paragraph provides the most pertinent points:

> *The statutes of limitation applicable are those which were in effect at the time of the incidents giving rise to the criminal charges." State v. Mack, 637 So.2d 18, 19 (Fla. 4th DCA 1994). "Statutes of limitations, as a general rule, affect substantive rights" and "[s]tatutes which affect substantive rights are presumed to operate prospectively absent clear legislative intent to the contrary." State v. Shamy, 759 So.2d 728, 729 (Fla. 4th DCA 2000). "However, the legislature can amend statutes of limitation to apply retroactively without running afoul of the constitutional ex post facto prohibition if it (a) does so before prosecution is barred by the old statute, and (b) clearly indicates that the new statute is to apply retroactively to cases pending when it becomes effective." Scharfschwerdt v. Kanarek, 553 So.2d 218, 220 (Fla. 4th DCA 1989).*

Crews v. State, 2015 WL 7566535 (Fla.,2015)

> Sex offense charges against public school teacher involved "misconduct in office," within meaning of statute extending the limitations period; defendant became acquainted with, and befriended, the minor victims through defendant's role as victims' teacher, and by means of his role as teacher, defendant gained opportunity to invite victims to accompany him to events and activities and ultimately to take them to locations where the offenses took place.

Therlonge v. State, 2015 WL 2393283 (Fla.App. 4 Dist.): *opinion substituted on rehearing at 2015 WL 4385586*

> Police investigation was not sufficient to trigger the extension of statute of limitations for when DNA evidence was preserved and the identity of the accused was later established in prosecution for lewd and lascivious battery of a person under 16 years of age, where DNA evidence was collected only after defendant was located by police, well after their original investigation was declared inactive.
>
> The facts of this case present a good lesson for officers. Police learned that a 15 year old girl gave birth to a baby. The 29-year-old suspect was listed as the father on the birth certificate. The suspect fled the state when he learned of the investigation. The police classified the case as inactive while they periodically made efforts to locate him. Two years and 9 months later, they found the suspect and got his DNA. They then got DNA from the baby and mother. When the results came back a little past the 3 year statute of limitations, the case was filed. The State argued that 775.15(16) gave them additional time to file. This section states,
>
> > *In addition to the time periods prescribed in this section, a prosecution for [a lewd or lascivious offense] may be commenced at any time after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence, if a sufficient portion of the evidence* ***collected at the time of the original investigation*** *and tested for DNA is preserved and available for testing by the accused [.]*
>
> The court ruled that since the DNA was not collected "at the time of the original investigation," this section did not apply. The court noted that the police did not even collect DNA from the mother or the baby during the original investigation.

Crews v. State, 2013 WL 6050783 (Fla.App. 1 Dist.)

> Sexual offenses committed against children by teacher constituted "misconduct in public office" within scope of statute extending statute of limitations for offenses constituting misconduct in public office.
>
> Statute extending the statute of limitations for offenses constituting "misconduct in public office" may apply to sexual offenses against a child committed while the accused was indisputably a public school teacher.

Goings v. State, 2011 WL 5842805 (Fla.App. 1 Dist.)

> Arrest on charge for sexual battery by familial or custodial authority, executed approximately 15 years after warrant was issued, was executed "without unreasonable delay," for limitations purposes under statute in effect at time of offense; defendant did not dispute that he was continuously absent from state, state searched diligently for defendant after it received DNA test results, and while defendant testified that he was in custody out-of-state on two separate occasions, he did not testify that anybody in state knew that he was in custody.
>
> Defendant waived claim on direct appeal that prosecution for sexual battery by familial or custodial authority was time-barred due to failure to prosecute case within three years of expiration of primary applicable limitations period, under statute in effect at time of offense, where he did not raise claim with trial court.

Dixon v. State, 36 Fla. L. Weekly D387 (Fla. 2d DCA 2011):

> Statute permitting a prosecution for certain offenses within one year after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of DNA, did not authorize prosecution of defendant more than ten years after the charged sexual battery offense, where such statute had not been enacted when the statute of limitations for defendant's sexual battery offense otherwise expired.

LaMorte v. State, 984 So.2d 548 (Fla. 2d DCA 2008):

> Extension of limitations period for offense based upon misconduct in office by public officer or employee applied to public school teacher.
>
> Extension of statute of limitations period for any offense based upon misconduct in office by public officer or employee did not apply only to persons who held public office; amendment to statute specifically edited statute to eliminate

reference to "offenses" committed during officials' "terms of office" which were "connected with the duties of their office," but instead, amended statute used words "misconduct in office" and added public "employee" to list of persons included in extension of limitations period, thus rewriting statute clearly indicated that it did not intend to restrict extension of limitations period only to those individuals who held public office as legislature specifically included word "employee" and referenced employee's "employment."

Clements v. State, 979 So.2d 256 (Fla. 2d DCA 2007):

State failed to prove that defendant committed sexual battery on victim on or after date new statute, tolling four-year limitations period, took effect; victim, victim's mother, victim's sister, and detective did not provide specific dates when battery occurred, mother's testimony on defendant's touching of victim did not specify type of touching, and doctor who examined victim could not indicate when sex between victim and defendant occurred.

In criminal cases, the statute of limitations must be liberally construed in favor of the accused.

Offense of sexual battery by a person in a familial or custodial authority was not a continuing offense, for purposes of calculating the limitations period; legislature did not intend to prohibit the offense as a continuing course of conduct, and offense was by its nature complete and prosecutable based on one incident of penetration or union.

Discussion: This case discusses a version of the statue of limitations that changed October 1, 1993. More importantly, it states that if your time frame encompasses two separate limitations periods, the defendant must be given the benefit of the doubt when the jury does not specifically find that one of the sexual acts occurred after the limitations change.

Torgerson v. State, 964 So.2d 178 (Fla. 4th DCA 2007):

Statute of limitations in effect at time defendant allegedly committed offenses were applicable, in trial for lewd or lascivious battery on a person between 12 and 16 and sexual battery, such that, because the victim was under 16 years of age, limitations period began to run when victim reached 16 or when crime was reported to law enforcement agency.

Discussion: On May 18, 2005, the state charged the defendant with lewd battery and sexual battery occurring between the dates of January 1, 2001 and August 14, 2001. The victim turned 16 on August 15, 2001. The State erroneously applied

the statute of limitations that went into effect on October 1, 2001, which indicated the limitations did not begin to run until the victim's 18th birthday. Because the date range charged terminated before October 1, 2001, the State should have relied on the previous version of the statute that indicated the limitations period began running on the child's 16th birthday.

State v. Calderon, 951 So.2d 1031 (Fla. 3rd DCA 2007):

Amendment to the limitations statute for felonies resulting in death, which altered the limitations period from four years to provide that prosecution could be commenced at any time, applied retroactively to defendant's first degree conspiracy to commit murder charge; amended statute stated that it applied "to pending cases the prosecution of which has not been barred" prior to the enactment date of amendment, defendant had committed his crimes prior to the enactment of amended statute and charges against defendant were not time-barred when amended statute went into effect, and amended statute did not only apply to cases in which charges were already filed.

Discussion: This is not a sex offense, but the language discussed is similar to the language used in the DNA extension in the statute of limitations statute. 775.15(15)(b). The general rule is that we have to apply the statute of limitations that existed at the time of the offense. When the above language is written into the statute, however, we can apply the new statute of limitations as long as the old statute had not expired at the time of the amendment.

Dankert v. State, 859 So.2d 1221 (Fla. 2d DCA 2003):

Prosecution was barred where information was filed more than three years after date of offense and more than three years after HRS child abuse investigator investigated report of sexual molestation and submitted report of investigation to state attorney's office.

There is no merit to state's contention that report to HRS was insufficient to trigger running of statute of limitations because HRS did not uncover any information that would corroborate the report.

Hearndon v. Graham, 767 So.2d 1179 (Fla. 2000):

Where plaintiff in tort action based on childhood sexual abuse alleges that she suffered from traumatic amnesia caused by the abuse, the delayed discovery doctrine postpones accrual of the cause of action.

Delayed discovery doctrine may only be applied to the accrual of a cause of action, and may not be applied to toll the running of statute of limitations.

Error to dismiss complaint alleging childhood sexual abuse on ground that action was barred by statute of limitations where alleged abuse occurred from 1968 to 1975, abuse was not recalled until approximately 1988, and complaint was filed in 1991, prior to 1992 enactment of statutory delayed discovery doctrine.

Discussion: This case does not apply to criminal prosecutions, but we occasionally get victim's who ask us if they can still pursue a case civilly. Although we cannot advise them on civil matters, we can suggest they discuss this case with a civil attorney.

Babb v. State, 764 So.2d 776 (Fla. 1st DCA 2000):

A prosecution for sexual battery upon a child can be commenced at any time.

The statute of limitations for other sexual offenses upon children does not begin to run until victim reaches age sixteen or violation is reported to law enforcement agency or other governmental agency, whichever occurs earlier.

Discussion: The most enlightening issue addressed by the court was unfortunately not resolved. The victim in this case had earlier confided in her psychologist about the sexual abuse, who in turn notified HRS. The appellate court noted that this fact was not presented to the trial court at the motion to dismiss and was thus not preserved for appellate review.

Jarrell v. State, 756 So.2d 1102 (Fla. 1st DCA 2000):

Trial court ruled that offenses charged in 1997 informations were not based on same conduct or criminal episode for which Defendant was arrested in 1973. No error in denying motion for discharge on speedy trial grounds.

Defendant failed to demonstrate actual prejudice resulting from pre-indictment delay and therefore it was not error in denying motion to dismiss based upon due process grounds.

Discussion: The defendant was arrested in 1973 for sexually molesting a particular child. A no-information was filed on that case. The suspect was arrested later in 1973 for lewd act in the presence of the same child as well as some others. These charges were eventually nolle prossed. In July of 1997, informations were charged against the suspect for molesting three children in 1973, one of which was the victim. Since the charges for which the Defendant was arrested in 1973 did not cover the particular days that were in the information filed in 1997, there was no speedy trial problem.

Webb v. State, 724 So.2d 646 (Fla. 5th DCA 1999):

Defendant has burden of proving proper waiver of statute of limitations.

No error in refusal to give instructions on lesser included offenses to capital sexual battery for which statute of limitations had run where defendant did not waive statute of limitations.

Discussion: When we file capital sexual battery charges which occurred several years ago, the suspect cannot plea to or be sentenced to lesser offenses which occurred outside the statute of limitations unless he affirmatively states on the record that he is knowingly and intelligently waiving the statute of limitations. Since the defendant never did this in this case, he had no right to request lessers. In fact, if the judge had instructed the jury on lessers without a proper waiver, the convictions for those lessers would have been reversed with jeopardy attached.

Mercer v. State, 654 So.2d 1221 (Fla. 5th DCA 1995):

State's failure to allege that defendant's acts of capital sexual battery occurred during time that unlimited statute of limitations was in effect, rather than during time that two-year statute of limitations was in effect, required reversal of conviction; defendant was entitled to benefit of possibility that offenses occurred within time that two-year limitations period was in effect.

Limitations period in effect at time of action giving rise to criminal charges controls time in which prosecution must be initiated.

Discussion: To fully grasp the significance of this opinion, it is important to note the following excerpt from the opinion:

> Here, the prohibited sexual acts were alleged to have occurred during the eight and one half months between January 1972 and September 16, 1972. Two different limitations periods were applicable during that time frame. From January 1, 1972 to July 24, 1972, there was no time limitation for prosecuting the offense of forcible intercourse on a child less than ten as the crime was punishable by death. > (FN2) On July 24, 1972, Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), holding the death penalty unconstitutional, became effective. When the death penalty fell, so too did the unlimited statute of limitations. Reino v. State, 352 So.2d 853 (Fla.1977), receded from on other grounds, Perez v. State, 545 So.2d 1357 (Fla.1989). From July 24, 1972 to October 1, 1972, > (FN3) the two year statute of limitations provided in subsection 932.465(2) controlled. Reino, 352 So.2d at 861.

FN2: Section 794.011, Fla.Stat. (1971) provided that "whoever ... unlawfully or carnally knows and abuses a female child under the age of ten years" was guilty of the offense of rape, a capital felony. Subsection 775.082(1), Fla.Stat. (1971) provided that a person convicted of a capital felony "shall be punished by death." Prosecution for an offense punishable by death could be commenced at any time. Sec. 932.465(2), Fla.Stat. (1971).

FN3: . October 1, 1972 was the effective date of section 921.141, Florida Statutes (Supp.1972), the re-enacted and revised death penalty statute which resurrected the classification of "capital crimes" and, concomitantly, the unlimited statute of limitations applicable thereto. See Ch. 72-72, Sec. 1, at 241, Laws of Fla.; Manucy v. Wadsworth, 293 So.2d 345 (Fla.1974).

Perez v. State, 545 So.2d 1357 (Fla. 1989):

Limitations period in effect at time of incident giving rise to criminal charges controls time within which prosecution must begin; therefore, defendant's prosecution for sexual battery was not time barred inasmuch as, at time of alleged offenses, death was possible penalty and no limitations period was applicable.

Discussion: This case is very helpful in understanding the legislative changes in the statute of limitations statute. The dissenting opinion offers a good history.

Bongiorno v. State, 523 So.2d 644 (Fla. 2d DCA 1988):

Amended information charging completed sexual battery of child under age 11 was not merely continuation of original information charging attempted sexual battery and thus, for statute of limitations purposes, lesser included offense of battery incident to more serious charge of completed sexual battery did not relate back to time of filing original information, even if battery was also lesser included offense of original charge; more serious amended charge alleged completed act not originally charged and also alleged conduct by defendant during time period extending two months beyond time period in original charge.

Tucker v. State, 459 So.2d 306 (Fla. 1984):

Before allowing defendant to divest himself of statute of limitations defense, court must be satisfied that defendant himself, personally and not merely through his attorney, appreciates nature of right he is renouncing and is aware of potential consequences of his decision.

Effective waiver of statute of limitations defense may only be made after determination on the record that waiver was knowingly, intelligently and

voluntarily made; waiver was made for defendant's benefit and after consultation with counsel; and waiver does not handicap defense or contravene any of the public policy reasons motivating enactment of the statute.

Request for jury instructions on lesser included but time-barred defenses did not effect valid waiver of statute of limitations defense; thus, defendant was not entitled to such instructions.

Discussion: When we charge a defendant with capital sexual battery when the offense occurred many years earlier, we are often faced with the dilemma of how to negotiate a plea. A plea as charged carries life in prison with a mandatory 25 year minimum. If we plea to a lesser offense, such as an attempt, the statute of limitations becomes a problem. In order to get around this problem, the defendant must waive the issue on the record before the judge. The judge must make a finding on the record that the defendant knowingly and voluntarily waives the statute of limitations issue. The same reasoning applies when a defendant requests a lesser included offense at trial. Please take note that the defense counsel cannot waive this issue on his client’s behalf.