

No. SC92230

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

GRANT L. MIXON,

Respondent.

**Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Jason R. Brown, Judge**

APPELLANT'S REPLY BRIEF

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ARGUMENT

I (constitutionality of statute of limitations).

Respondent's (Defendant's) argument is built on the false premise that the criminal statute of limitations (§ 556.036) purports to permit a criminal prosecution solely by complaint. He even goes so far as to argue that the statute of limitations allowed him to be "prosecuted" without an information. Resp. Br. 15. But had the circuit court not declared the statute of limitations unconstitutional and dismissed this case, a preliminary hearing would have followed the filing of the complaint. If the State had proven at that hearing that probable cause existed to believe Defendant committed the offense, it would have then filed an information against Defendant. The State had no intention, or even the opportunity, to prosecute Defendant solely by complaint, and Defendant's suggestion to the contrary simply confuses the issue.

Everyone agrees that no one may be criminally prosecuted for a felony except by information or indictment. But this is not the same as saying that a criminal prosecution is "commenced" only upon the filing of either an information or indictment. Defendant misperceives the purpose behind the language in the statute of limitations by suggesting that article I, § 17 mandates that a criminal prosecution be commenced or initiated only by indictment or information. But the constitution does not in any way purport

to identify the precise moment in time, or the specific event that triggers, commencement or initiation of a criminal prosecution. In fact, the plain language of the constitutional provision states that it should not be read to prevent arrests or preliminary examinations, which are surely part of the criminal process. The purpose of article I, § 17 is to require that any criminal prosecution be accomplished through either indictment or information to insure that the defendant has notice of the charges that due process demands.

The purpose of a statute of limitations, on the other hand, is to identify the specific events that both begin and toll the limitations period. Under § 556.036, those events are the day after the offense is committed and the filing of either an indictment or complaint. The manner in which the General Assembly drafted the statute (“prosecutions . . . must be commenced within the following periods of limitation”) made it necessary to include a provision in subsection 5 defining what constituted commencement of a “prosecution” for statute-of-limitations purposes. The fact that it chose the filing of a complaint as one of those triggering events does not mean that it was permitting a prosecution solely by complaint in violation of the constitution. Defendant’s convoluted and forced construction of the statute—contrary to its plain meaning and purpose—in an effort to engineer a conflict with the

constitution constitutes a woefully inadequate basis to justify the extreme judicial remedy of striking down a solemn act of the legislature.

Defendant suggests that there is a difference between criminal proceedings and criminal prosecutions. Resp. Br. 11. Extrapolating from that argument, this would suggest that Defendant would also concede that if the statute of limitations had used the phrase “criminal proceedings” rather than the word “prosecutions” in subsection 1 quoted above, the statute would not conflict with the constitution. In other words, according to Defendant, a criminal proceeding may be commenced by an arrest or the filing of a complaint, but a criminal prosecution may only be commenced by the filing of an indictment or information. He goes on to say that article I, § 17 “clear[ly]” provides that “[p]rosecution for a felony *begins* when an indictment or information is filed.” Resp. Br. 13 (emphasis added). There are several problems with this argument.

First, this parsing of words is not necessary to achieve the purposes of either the constitutional provision or the statute of limitations. Defendant construes the statute of limitations in a way that creates a problem that simply does not exist. If a statute can be construed in a manner consistent with the constitution, courts will elect that construction over one that causes it to be unconstitutional.

Second, article I, § 17 does not say that a prosecution begins with the filing of an indictment or information. It simply provides that no one may be criminally prosecuted “otherwise than by indictment or information.” It then concludes with language expressly providing that this limitation should not be read to prevent arrests and preliminary examinations in a “criminal case.” Thus, under the premise of Defendant’s argument, a “criminal case” may begin before the filing of an information or indictment.

Third, the constitutionality of the statute of limitations cannot be dependent on whether the legislature used the word ‘prosecution’ or the phrase ‘criminal proceeding’ (or ‘criminal case’). This would make the serious business of determining the constitutional validity of the statute of limitations little more than a game of semantics.

The General Assembly was within its rights to employ the word ‘prosecution’ in the statute and define it for statute-of-limitations purposes as the filing of either a complaint or indictment. There is certainly nothing novel or unconstitutional in doing this. *Compare* § 56.060, RSMo Cum. Supp. 2011 (“Each prosecuting attorney shall commence and prosecute all civil and criminal actions in the prosecuting attorney’s county”); § 191.910, RSMo Cum. Supp. 2011 (“Upon receiving a referral, the prosecuting attorney shall . . . commence a prosecution . . . by the filing of a complaint, information, or indictment . . .”); § 513.605, RSMo Cum. Supp. 2011 (defining

the phrase ‘criminal proceeding’ as “any criminal prosecution commenced by an investigative agency under any criminal law of this state”). The word ‘prosecution’ does not necessarily have a technical meaning under the statute; it has been defined as simply the “institution and conduct of a legal proceeding.” The American Heritage Dictionary 994 (2d college ed. 1985). The filing of a complaint in a court under Missouri court rules is obviously the institution of a legal proceeding.

Defendant relies on *Dillard v. State*, 931 S.W.2d 157 (Mo. App. W.D. 1996), for the proposition that a “complaint does not initiate criminal proceedings,” but that case is inapposite. Resp. Br. 11. *Dillard* involved a 20-month delay between the filing of the complaint and the defendant’s arrest. *Id.* at 163. Although the court noted that a complaint does not “initiate a criminal prosecution,” *id.* at 161, this was merely a quotation from an opinion in which the United States Supreme Court held that the Sixth Amendment right to a speedy trial does not begin until an arrest or formal criminal charge is filed. In other words, the *Dillard* court was simply noting that the mere filing of a complaint does not implicate a defendant’s speedy-trial rights under the Sixth Amendment.

Defendant also argues that the statute of limitations should be held unconstitutional because a defendant would otherwise have no remedy for a delay between the filing of a complaint and the information. Setting aside the

fact that in Defendant's case no delay occurred because the circuit court dismissed the complaint well before an information could have been filed, *Dillard* holds that the Due Process Clause "protects [a defendant] against undue pre-arrest or pre-indictment delay." *Id.* at 163. Moreover, Rule 22.09(a) provides that a preliminary hearing must be "held within a reasonable time" after a complaint is filed and, if probable cause is found by the court, Rule 23.03 requires that an information be filed within 10 days. Finally, § 217.450.1, RSMo Cum. Supp. 2011, provides that DOC prisoners "may request a final disposition of any untried indictment, information or complaint pending in this state" for which a detainer has been lodged against them.

Another troubling aspect of the circuit court's dismissal in this case is its presumption that by finding the current statute of limitations unconstitutional, the statute was restored to its pre-amended version, which provided that the filing of an information, rather than a complaint, tolled the statute of limitations. But this overlooks the fact that the legislature repealed § 536.036 and reenacted an amended version that replaced the filing of an "information" with the filing of a "complaint" as the triggering event tolling the statute. Determining that the legislature's use of the filing of a complaint as the tolling event as being unconstitutional does not revive the pre-amended version of the statute. Although statutory provisions are severable

under § 1.140, severability does not apply if the court finds the legislature would not have enacted the law without the invalid provision or if the remaining valid provisions standing alone are incapable of being executed consistent with legislative intent:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Section 1.140, RSMo 2000.

It seems plainly apparent that the General Assembly wanted the filing of a complaint or an indictment to be the two events tolling the statute of limitations. And it seems equally apparent that it did not intend to have only the filing of an indictment as that triggering event. A determination that the statute does not conflict with the constitution avoids these thorny issues.

Defendant's argument presumes that the General Assembly was constitutionally bound to choose the filing of an information or indictment as

the only two events that could toll the statute of limitations. But he fails to explain why the legislature did not have the authority to choose some other event. The simple fact is that the legislature had the authority to choose, within reason, any event it liked as a triggering event for tolling the statute of limitations. Statute of limitations are creatures of statute, and its choice in this case did not “clearly and undoubtedly” violate the provisions of article I, § 17.

CONCLUSION

The circuit court erred in declaring § 556.036.5, RSMo Cum. Supp. 2011, unconstitutional and in dismissing the State's felony complaint against Defendant with prejudice. This Court should reverse the circuit court's judgment and set aside the court's dismissal of the felony complaint against Defendant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached reply brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 1,831 words, excluding the cover, certification, and appendix as determined by Microsoft Word 2007 software; and that this brief was served through Missouri's electronic filing system on August 27, 2012, on:

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