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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This appeal is from a criminal case wherein the Circuit Court of Lafayette County, Missouri, 15th Judicial Circuit, the Honorable Dennis A. Rolf, Judge, dismissed with prejudice for want of prosecution the State's charge of failing to drive on the right half of the roadway against Defendant Benjamin Thomas Honeycutt. This case does not come within the exclusive appellate jurisdiction of the Missouri Supreme Court under Mo. Const. Art. IV §3, because it does not involve the construction or validity of any constitution, statute, treaty, revenue law or title to state office, nor is it a capital case. Therefore, it comes within the general appellate jurisdiction of the Missouri Court of Appeals. Because it is an appeal from the 15th Judicial Circuit, it is properly before the Missouri Court of Appeals, Western District.

STATEMENT OF FACTS

On December 22, 1997, the State filed separate misdemeanor charges of driving while intoxicated and failure to drive on the right half of the roadway against Benjamin Thomas Honeycutt in the Circuit Court of Lafayette County, Associate Division III (Supp.L.F. 1; L.F. 5). The case number for the driving while intoxicated charge in the Associate Division was CR397-1145M (Supp.L.F. 1). When it was certified and transferred to the Circuit Court, Division I, of Lafayette County, it became case no. CR397-1145MX (Supp.L.F. 3). The case number in the Associate Division for the failure to drive on right half of the roadway charge was CR397-11123T (L.F. 5). After assignment and certification it became case no. CR397-11123TX (L.F. 7). Originally, in the Associate Division, both charges were filed by Uniform Complaint and Summons (Supp.L.F. 5; L.F. 14).

After the cases were transferred to the Circuit Division, the State filed a formal, written information on the driving while intoxicated charge, separate from the Uniform Complaint and Summons previously filed (Supp.L.F. 6-7). In fact this was noted by the State in handwriting on the Uniform Complaint and Summons (Supp.L.F. 5). There was never an information filed by the State in the Circuit Division on the failure to drive on the right half of the roadway charge. The only note of any record of this charge in the Circuit Division (before March 19, 2001, when the present issues developed) is that of April 27, 1998 (L.F. 7). The docket sheet merely notes the appearance of counsel and that the cause was continued. It does not note any information or any other filings of this charge by the State in the Circuit Division (L.F. 7).

Thereafter, the parties proceeded to trial on the driving while intoxicated charge, which resulted in a jury acquittal on November 5, 1998 (Supp.L.F. 3-5, 8). The State never filed an information nor prosecuted the companion charge of failure to drive on the right half of the roadway.

Then on March 19, 2001, more than three years and four months after the original Uniform Complaint and Summons was filed in the Associate Division, the State commenced proceedings to prosecute the failure to drive on the right half of the roadway charge in the Circuit Division (L.F. 7). The case was continued until April 30, 2001 (L.F. 7). At that time defense counsel orally moved to dismiss the case based on statute of limitations and res judicata grounds (Tr. 6-8). The case was set over until May 14, 2001 (Tr. 9). On May 7, 2001, seven days prior to the hearing on May 14, defendant filed his Motion to Dismiss (L.F. 10). The motion was heard on May 14, 2001 (L.F. 7). The defense's argument was that because the State had not filed an information within one year of the offense, the statute of limitations had run (Tr. 10-14; L.F. 10). The Court dismissed the case for want of prosecution (Tr. 14).

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE FAILURE TO DRIVE ON THE RIGHT HALF OF THE ROADWAY CHARGE FOR WANT OF PROSECUTION BECAUSE THE TRIAL COURT EXERCISED SOUND DISCRETION IN DISMISSING THE CASE IN THAT THE STATE DID NOT PROSECUTE THE CHARGE ALONG WITH THE COMPANION DRIVING WHILE INTOXICATED CHARGE, WITHOUT REASONABLE EXCUSE; THE STATE DID NOT PROSECUTE THE CHARGE AT ALL FOR OVER THREE YEARS, WITHOUT REASONABLE EXCUSE; AND ALLOWING PROSECUTION AT THIS POINT IN TIME WOULD HAVE BEEN PREJUDICIAL TO DEFENDANT.

Gates v. State, 515 S.W.2d 762 (Mo. App. 1974).

Giddens v. Kansas City Southern Railway, 29 S.W.3d 813 (Mo. banc 2000).

State v. Stringer, 36 S.W.2d 821 (Mo. App. 2001).

II. THE TRIAL COURT DID NOT ERR IN DISMISSING THE FAILURE TO DRIVE ON THE RIGHT HALF OF THE ROADWAY CHARGE BECAUSE THE STATUTE OF LIMITATIONS HAD RUN ON THIS MISDEMEANOR CHARGE IN THAT THE STATE NEVER FILED AN INFORMATION IN ITS PROPER FORM AGAINST DEFENDANT ALLEGING THIS CHARGE WITHIN ONE YEAR OF THE OCCURRENCE.

§556.036.2(2), RSMo. 1994.

State v. Rotter, 958 S.W.2d 59 (Mo. App. 1997).

State v. Spraggins, 839 S.W.2d 599 (Mo. App. 1992).

State v. Stringer, 36 S.W.2d 821 (Mo. App. 2001).

State v. Bithorn, 278 S.W. 685 (Mo. 1925).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE FAILURE TO DRIVE ON THE RIGHT HALF OF THE ROADWAY CHARGE FOR WANT OF PROSECUTION BECAUSE THE TRIAL COURT EXERCISED SOUND DISCRETION IN DISMISSING THE CASE IN THAT THE STATE DID NOT PROSECUTE THE CHARGE ALONG WITH THE COMPANION DRIVING WHILE INTOXICATED CHARGE, WITHOUT REASONABLE EXCUSE; THE STATE DID NOT PROSECUTE THE CHARGE AT ALL FOR OVER THREE YEARS, WITHOUT REASONABLE EXCUSE; AND ALLOWING PROSECUTION AT THIS POINT IN TIME WOULD HAVE BEEN PREJUDICIAL TO DEFENDANT.

The standard of review of a trial court's ruling in dismissing a criminal charge for want of prosecution is abuse of discretion. *Gates v. State*, 515 S.W.2d 762, 763 (Mo. App. 1974). The trial court is vested with discretion to assure that, taking all of the circumstances into account, there was a manifest necessity to abort the proceeding. *Id*. An abuse of discretion only occurs when the trial court's ruling is clearly against the logic of circumstances, and is so arbitrary and unreasonable that it shocks the sense of justice and indicates the lack of careful consideration. *Giddens v. Kansas City Southern Railway*, 29 S.W.3d 813, 819 (Mo. banc 2000). The party attacking the dismissal for want of prosecution has the burden to show that the circumstances were such that the trial court was not in this exercise of sound discretion. *Gates*, 515 S.W.2d at 762.

Here, the State filed contemporaneous charges occurring out of the same incident of driving while intoxicated and failing to drive on the right half of the roadway against Defendant Benjamin Thomas Honeycutt. Both were assigned and certified to the Circuit Court to be set for jury trial. Yet for no apparent reason, the State only filed an information in the Circuit Court on the driving while intoxicated charge and only prosecuted that to trial, where Defendant Honeycutt was acquitted. The State gives no reason whatsoever for failing to file an information or prosecute the failing to drive on the right half of the roadway charge.

Then in March of 2001, more than three years and four months after the original charge was filed, and after failing to prosecute the companion case along with the driving while intoxicated charge, the State seeks to prosecute Defendant Honeycutt on a failure to drive on the right half of the roadway charge. Again, without any apparent reason or excuse for the delay.

Under these circumstances it would be extremely unfair and prejudicial to prosecute Defendant Honeycutt on the companion charge. Taking all the circumstances into account, there was a manifest necessity to abort the proceeding. To rule otherwise would give authority for the State to file multiple charges against a particular person and then pick and choose which charges to proceed with prosecution, and which to allow to lay dormant, only to revive the dormant charges years later and seek to prosecute those. Such a result would be absurd.

The State has given absolutely no good reason for its conduct. Contrary to what the State says in its brief, it was given ample opportunity to address the merits of the

dismissal of this charge. On March 19, 2001, the State re-commenced its prosecution of the charge it had originally filed on December 22, 1997 (Supp.L.F. 1; L.F. 5, 7). The case was continued until April 30, 2001 (L.F. 7). At that time, Defendant moved to dismiss the case based on statute of limitations and res judicata grounds (Tr. 6-8). The case was continued for an additional two weeks until May 14, 2001 (Tr. 9). Yet on May 7, 2001, seven days prior to the hearing on May 14th, Defendant filed his formal, written Motion to Dismiss (L.F. 10). The motion was orally heard and argued in open court on May 14, 2001 (Tr. 10-14).

Furthermore, the Court has broad authority to dismiss a charge brought by the State, sua sponte, with prejudice. *State v. Stringer*, 36 S.W.2d 821, 822 (Mo. App. 2001). This includes not only for want of prosecution, but also for lack of jurisdiction or the failure of an information to sufficiently charge a misdemeanor offense. *Id*.

Taking all the circumstances into account, the State has clearly failed to show that the trial court abused its sound discretion in ordering the dismissal.

II. THE TRIAL COURT DID NOT ERR IN DISMISSING THE FAILURE TO DRIVE ON THE RIGHT HALF OF THE ROADWAY CHARGE BECAUSE THE STATUTE OF LIMITATIONS HAD RUN ON THIS MISDEMEANOR CHARGE IN THAT THE STATE NEVER FILED AN INFORMATION IN ITS PROPER FORM AGAINST DEFENDANT ALLEGING THIS CHARGE WITHIN ONE YEAR OF THE OCCURRENCE.

The standard of review is de novo. The statute of limitations for the misdemeanor violation of failing to drive on the right half of the roadway is one year, as with all

misdemeanors. §556.036.2(2), RSMo. (1994); *State v. Rotter*, 958 S.W.2d 59, 63 (Mo. App. 1997). An information must be filed within one year of the misdemeanor, otherwise the statute of limitations will have run and the trial court is without jurisdiction as to the charge. *State v. Spraggins*, 839 S.W.2d 599, 602-03 (Mo. App. 1992).

A criminal charge may be brought by indictment or information. *State v. Stringer*, 36 S.W.3d 821, 822 (Mo. App. 2001). The indictment or information must actually charge that a crime has been committed. *Id*. The test for the sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute creating the offense. *Id*. To be sufficient, the information must also clearly advise the defendant of the facts constituting the offense so that he may prepare an adequate defense and prevent re-trial on the same charges in the case of an acquittal. *Id*.

Here, the State never filed an information on the failure to drive on the right half of the roadway charge against Defendant Honeycutt. This is despite filing a separate, written, formal information on the companion case, the driving while intoxicated charge.

In the lower division court, the State merely filed its charge with its standard Uniform Complaint and Summons. This is a merely a form filled out in handwriting by the State Trooper with the words "failed to drive on the right half of the roadway when the roadway was of sufficient width." This falls far short of the strict standards to charge a crime by information as set forth above. Further, a simple complaint, such as the one the State filed here in the Associate Division, is insufficient to charge a crime. The information must be filed within the statute of limitations governing the charge, and it is

the filing of the information that is the commencement of the action; it is not commenced by the filing of a complaint. *State v. Bithorn*, 278 S.W. 685, 686 (Mo. 1925).

Therefore, in this case, the statute of limitations has run because the State did not file its information within one year of the date of the offense, like it did on the driving while intoxicated charge. In fact, the State has never filed an information on the pending charge. Thus the State's charge was properly dismissed with prejudice, although the trial court may have done so for other reasons.

CONCLUSION

The trial court did not abuse its discretion in dismissing the State's charge against Defendant Honeycutt taking all circumstances into account and considering the State's failure to prosecute the case along with the companion charge, considering the State's extreme delay in prosecuting, and considering the prejudice it would cause to Defendant. The dismissal of the pending charge against Defendant Honeycutt was also warranted because the State never filed an information and the statute of limitations has run on this misdemeanor charge. In light of the foregoing, the decision of the trial court must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's Brief complies with the limitations set forth in Rule 84.06(b), and contains _____ words therein, and further that the brief on disk filed herein, pursuant to Rule 84.06(g), has been scanned for viruses and is virus free.

_____

JOHN B. NEHER #33840

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original and ten copies of the above and foregoing Respondent's Brief, together with a disk containing such brief pursuant to Rule 84.06(g), was filed in the Missouri Court of Appeals, Western District, 1300 Oak, Kansas City, Missouri 64106, and prior to its presentation two copies, including the brief on disk, was mailed, postage prepaid, this _____ day of August, 2001, to: Terrence M. Messonnier, Lafayette County Assistant Prosecuting Attorney, P.O. Box 59, Lexington, Missouri 64067, **ATTORNEY FOR APPELLANT/PLAINTIFF**.

_____

JOHN B. NEHER