

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070001
	:	TRIAL NO. B-0602634
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
DENNIS A. COUCH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Dennis A. Couch appeals from the convictions and the sentences imposed by the trial court after it accepted his pleas of no contest to a five-count indictment alleging that, in July 1992, Couch had kidnapped a 17-year-old girl at gunpoint and then brutally raped her. The victim was unable to identify Couch, and he avoided prosecution until 2006. In late 2005, DNA from the semen deposited on the victim's clothing was matched to a DNA sample collected from Couch by the commonwealth of Kentucky when Couch had violated his probation for a sexual-assault offense.

At a hearing on Couch's motion to dismiss, the victim, then 32 years old and married, recounted that, near midnight on July 19, 1992, she was returning from a local church festival and had stopped her car at an intersection in Anderson Township. Couch, brandishing a handgun and wearing a mask, forced his way into her vehicle. Blindfolding

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

the victim, Couch drove her to several secluded locations. Over the next hour, he violently and repeatedly raped her. Before abandoning his now bleeding victim, Couch warned her that if she looked at him he would kill her. The victim reported the crimes immediately but was not able to describe her attacker except to note that he was a white male.

Despite a thorough investigation, sheriff's deputies were unable to develop any suspects. But medical investigators were able to recover samples of Couch's semen from the victim's clothing. A coroner's office serologist testified that in 1992, without a national database of DNA samples, to identify or exclude a perpetrator based on DNA testing required a sample from an alleged perpetrator for comparison with DNA evidence collected at a crime scene. With no leads to identify Couch, the DNA evidence was then of limited value.

But law enforcement personnel continued diligently to attempt to match the DNA collected from the victim's clothing to known samples. In 2000, the coroner's office began to employ the Federal Bureau of Investigation's newly created Combined DNA Index System ("CODIS") to match DNA obtained from crime scenes to known DNA profiles of offenders stored on local or national DNA databases. In 2005, CODIS reported a match between the DNA recovered from the victim's clothing and the sample recently taken from Couch. After Couch was returned to Hamilton County, a second DNA sample confirmed Couch as the perpetrator of the 1992 rapes.

Testimony at the hearing from Couch's mother, sister, and wife revealed that while Couch was a lifelong resident of Kentucky, from 1987 until 1993 he had made brief trips to Ohio to visit his sister. His sister lived in Mt. Washington, a neighborhood of Cincinnati adjacent to Anderson Township.

After the trial court denied his motion to dismiss the indictment, Couch entered a no-contest plea to each charged offense. The trial court accepted Couch's pleas, found him

guilty, and imposed consecutive, maximum sentences for each offense, for an aggregate term of 53 to 128 years of imprisonment. The trial court also imposed, as part of the sentence, a mandatory five-year term of postrelease control.

In his first assignment of error, Couch contends that the trial court erred when it denied his motion to dismiss the indictment because the prosecution was barred by the statute of limitations.

The purpose of a criminal statute of limitations is to limit exposure to prosecution to a certain fixed period of time following the occurrence of an offense. The statute of limitations is not an exculpatory defense. It bars conviction of a defendant even if his guilt is clear.² Here the DNA evidence was undisputed; Couch's semen was collected from the victim's clothing, and it is simply not believable that his sexual contact with the victim was in any way consensual.³

The purpose of R.C. 2901.13, Ohio's criminal statute of limitations, is also "to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct."⁴ Here, the extraordinary efforts of sheriff's office and coroner's office personnel to identify the perpetrator of this brutal attack were anything but dilatory.

The historical rationale for limiting criminal prosecutions is that they should be based on reasonably fresh, and therefore more trustworthy, evidence.⁵ But the increasing integration of "DNA testing, to provide a universal means for criminal identification" * * *

² See *Toussie v. United States* (1970), 397 U.S. 112, 114-115, 90 S.Ct. 858.

³ See *State v. Crooks*, 152 Ohio App.3d 294, 2003-Ohio-1546, 787 N.E.2d 678, at ¶18; see, also, Note, Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete? (2001), 23 U.Ark.Little Rock L.Rev. 839, 856.

⁴ *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.*, 85 Ohio St.3d 582, 586, 1999-Ohio-408, 709 N.E.2d 1192, citing *State v. Hensley* (1991), 59 Ohio St.3d 136, 138, 571 N.E.2d 711.

⁵ See *State v. Crooks*, 2003-Ohio-1546, at ¶13; see, also, *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.*, 85 Ohio St.3d at 586, 1999-Ohio-408, 709 N.E.2d 1192.

was born of sound policy,”⁶ and provides reliable evidence not subject to deterioration or corruption, thus fulfilling the purpose of the statute of limitations.⁷ “[T]he advent of genetic fingerprinting in the mid-1980s [has] led to convictions that previously would have been impossible, exonerated criminal suspects before prosecutors filed charges, and freed mistakenly convicted defendants.”⁸

Former R.C. 2901.13(A), in effect on the date Couch committed these offenses, provided that prosecution for rape or kidnapping “shall be barred unless it is commenced within * * * six years” after the offense was committed. Although a 1998 amendment to the statute extended the statute-of-limitations period for both rape and kidnapping to twenty years, as the state concedes, the former six-year period applied to this case.⁹ The state bore the burden of proving that the prosecution was commenced within six years.¹⁰

But under both current and former R.C. 2901.13(G), the period of limitation does not run during any time when the defendant purposely avoids prosecution. The state can establish a prima-facie case that a defendant purposely avoided prosecution by demonstrating that he had “absented himself from this state or [had] concealed his identity or whereabouts.”¹¹ But that presumption may be rebutted by evidence presented at the hearing on a motion to dismiss.

The review of the trial court’s ruling on a statute-of-limitations determination involves a mixed question of law and fact. Therefore, we accord substantial deference to a trial court’s findings of fact if they are supported by competent, credible evidence. But we

⁶ Moyer and Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment* (2007), 22 *Berkeley Tech.L.J.* 671, 682.

⁷ See *State v. Crooks*, 2003-Ohio-1546, at ¶13; see, also, Comment, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants’ Constitutional and Statutory Rights* (2001), 50 *Am.U.L.Rev.* 979, 1000.

⁸ Moyer and Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 *Berkeley Tech.L.J.* at 682.

⁹ See *State v. Steele*, 155 Ohio App.3d 659, 663, 2003-Ohio-7103, 802 N.E.2d 1127.

¹⁰ See *State v. Gallant*, 174 Ohio App.3d 264, 2007-Ohio-6714, 881 N.E.2d 907, at ¶26.

¹¹ R.C. 2901.13 (eff. until March 9, 1999).

determine independently if the trial court correctly applied the law to the facts of the case.¹² A defendant's purpose for leaving the state of Ohio is a question of fact for the trial court to determine.¹³

In the hearing on Couch's motion, the parties stipulated that Couch had been a resident of Kentucky from the date of the offenses until his prosecution in 2006. Thus the state established its prima-facie case that Couch had absented himself from Ohio to avoid prosecution. But Couch presented the testimony of his mother, his sister, and his wife to demonstrate that he had left Ohio not to avoid prosecution but to continue his normal activities as a resident of Hardin County, Kentucky. After weighing the testimony, the trial court found that Couch's return to Kentucky was made, at least in part, to avoid prosecution for these offenses.

Despite making this factual finding, the trial court concluded that Couch had purposely avoided prosecution not by absenting himself, but by concealing his identity while committing these offenses. Thus, the statute of limitations was tolled from the time of the offenses until his prosecution. Tolling the limitations period by concealing one's identity usually requires acts by the defendant after the commission of the crime, such as changing his name or adopting a disguise to avoid prosecution.¹⁴ Neither of those situations was present in this case. Because "efforts at concealment are so common," to permit the state to toll a prosecution for 14 years because the defendant wore a mask and blindfolded his victim "would deprive the statute of limitations of most of its effect."¹⁵

Though we have rejected the trial court's explanation for its ruling, its factual findings were sufficient to support the conclusion that Couch had purposely avoided

¹² See *State v. Stamper*, 4th Dist. No. 05CA21, 2006-Ohio-722, at ¶30.

¹³ See *State v. Stansberry* (July 5, 2001), 8th Dist. No. 78195.

¹⁴ See, e.g., *State v. Gallant*, 2007-Ohio-6714, at ¶17; *State v. Roberts*, 8th Dist No. 84949, 2005-Ohio-2615, at ¶14.

¹⁵ LaFave and Israel, *Criminal Procedure* (1985), 699-700, Section 18.5.

prosecution not by concealing himself but by absenting himself from Ohio after 1993. A defendant need not have a sole purpose in absenting himself from a jurisdiction. A defendant “who departs for a legitimate reason from the jurisdiction in which his crime was committed but who later remains outside that jurisdiction for the purpose of avoiding prosecution is a fugitive from justice.”¹⁶ While Couch returned to Ohio for several visits to his sister in 1992 and 1993, each visit was brief in duration and in each instance Couch returned immediately to Kentucky thus placing again him outside the reach of Ohio law enforcement officers investigating these crimes. In effect, Couch used his legitimate residence outside the state to mask his escape from prosecution for heinous crimes committed against an Ohio resident.

Therefore, the trial court could reasonably have concluded that Couch had left Ohio to purposely avoid prosecution. Because there was some competent, credible evidence supporting the trial court’s factual determination that Couch left the state to avoid prosecution, we decline to substitute our judgment for that of the trial court.

Accordingly, we overrule Couch’s first assignment of error.

In his second and third assignments of error, Couch argues that the aggregate minimum term of imprisonment imposed—53 years—violated former R.C. 2929.41(E). The statute, in effect when Couch committed these crimes, limited the aggregate minimum prison term for consecutive sentences to 15 years.

Couch’s imposed sentences were thus erroneous. But they did not amount to reversible error.¹⁷ The Ohio Supreme Court has held that R.C. 2929.41(E) is self-executing, so Couch is not entitled to a corrected sentencing entry.¹⁸ Consequently

¹⁶ *United States v. Fonseca-Machado* (C.A.11, 1995), 53 F.3d 1242, 1244 (construing the analogous federal statute tolling the limitations period for “any person fleeing from justice”).

¹⁷ See *State v. White* (1985), 18 Ohio St.3d 340, 481 N.E.2d 596, syllabus; see, also, *State v. Elam* (Dec. 2, 1992), 1st Dist. No. C-920216.

¹⁸ See *id.*; see, also, *State ex rel. Hamann v. Ohio Dept. of Rehabilitation & Correction*, 96 Ohio St.3d 72, 2002-Ohio-3528, 771 N.E.2d 254, at ¶7.

Couch's consecutive prison terms should, in the aggregate, constitute a minimum of 15, not 53 years. The maximum sentence for the consecutive terms, however, remains 128 years. The second and third assignments of error are overruled.

In his fourth assignment of error, Couch asserts that the trial court erred in imposing postrelease control as part of his sentence. Because postrelease control did not exist prior to the enactment of Senate Bill 2, Couch claims that the trial court had no authority to impose a period of postrelease control as part of his sentences.

Although the trial court recognized that it was required to impose a sentence based on pre-Senate Bill 2 law, it nonetheless notified Couch that he would be subject to mandatory postrelease control upon the completion of his sentence. But because Couch did not suggest to the trial court that postrelease control was not a valid sentencing option, Couch has forfeited the issue for appellate review.¹⁹ Therefore, we review the trial court's actions only for plain error.²⁰

Postrelease control did not exist prior to the enactment of Senate Bill 2, and "[t]he sentencing provisions of [Senate Bill 2] expressly apply only to offenses committed after July 1, 1996."²¹ Because Couch committed these offenses in 1992, the trial court had no authority to impose a period of postrelease control as part of the sentences. As the state now concedes, the trial court erred.²²

Because the trial court's error in imposing postrelease control was "an 'obvious' defect in the trial proceedings" and affected Couch's substantial right to be free from punishment not warranted by law, it was plain error.²³ The outcome of the sentencing

¹⁹ See *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, at ¶21.

²⁰ See *id.* at ¶24; see, also, Crim.R. 52(B).

²¹ *State v. Haynes* (Mar. 5, 1999), 1st Dist. No. C-960794; see, also, *State ex rel. Lemmon v. Ohio Adult Parole Auth.*, 78 Ohio St.3d 186, 187-188, 1997-Ohio-223, 677 N.E.2d 347; *State v. Woodman* (1997), 122 Ohio App.3d 774, 777, 702 N.E.2d 974.

²² See Appellee's Brief at 10.

²³ *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

proceeding “ ‘would have been different absent the error.’ ”²⁴ The fourth assignment of error is sustained.

In his final two assignments of error, Couch argues that he was prejudiced by the state’s delay in commencing the prosecution after learning from the CODIS match that he was the perpetrator of the offenses, and that his trial counsel was ineffective for failing to raise this issue in the trial court.

These arguments must fail. The state’s delay was justified by the time required to locate the victim and to obtain Couch’s presence in Ohio.²⁵ Because of the nature of the forensic evidence, Couch was not prejudiced by the delay. And the actions of his experienced trial counsel, who vigorously highlighted the weaknesses in the state’s case, did not deprive him of a substantive or procedural right that rendered the proceeding fundamentally unfair.²⁶ The fifth and sixth assignments of error are overruled.

Because the trial court erroneously imposed postrelease control as part of Couch’s sentence, we sustain his fourth assignment of error. Thus, we modify the trial court’s judgment to reflect that Couch is not subject to postrelease control upon the completion of his terms of imprisonment. The trial court’s judgment is otherwise affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on June 25, 2008
per order of the Court _____.
Presiding Judge

²⁴ *State v. Payne* at ¶17, quoting *State v. Hill*, 92 Ohio St.3d 191, 203, 2001-Ohio-141, 749 N.E.2d 274.

²⁵ See *United States v. Lovasco* (1977), 431 U.S. 783, 790, 97 S.Ct. 2044.

²⁶ See *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; see, also, *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052.