

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

GERHART WEIMER,

APPELLATE DIVISION (CRIMINAL)
Case No.: 502008AP900039AXXXMB
Co. Court Case No.: 5006MM001939AXXMB

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Opinion filed: February 22, 2010

Appeal from Judge, Mark Eissey
County Court in and for Palm Beach County.

For Petitioner, Daniel Cohen, Esq., Office of the Public Defender, 421 Third Street/6th Floor,
West Palm Beach, FL 33401.

For Respondent, Michelle Zieba, Esq., Office of the State Attorney, 401 N. Dixie Highway, West
Palm Beach, FL 33401.

PER CURIAM.

On January 26, 2006, the State charged the Petitioner by Information with Failure to Pay Taxes with Return, a first degree misdemeanor. On May 13, 2008, the State executed a capias warrant against the Petitioner and in compliance with the requirements of the warrant, released the Petitioner on his own recognizance. On June 20, 2008, the Petitioner, through counsel, filed a Motion to Dismiss, arguing that the statute of limitations barred the State from prosecuting the Petitioner. On June 23, 2008, a Case Disposition Hearing was held. At this hearing, after defense counsel disputed that the Petitioner had been served with a summons for a February 28, 2006, hearing, the Petitioner stated, "I wasn't here. I was in the State of New York."

A hearing on the Motion to Dismiss was held on June 30, 2008. The State presented no testimony or evidence at the hearing. The court then denied the Motion to Dismiss.

The Petitioner petitioned this court for a writ of prohibition seeking review of the order denying his Motion to Dismiss. The Petitioner maintains that Florida law imposes on the State the burden to demonstrate that its delay in prosecution was not unreasonable and the State did not present such evidence. The State argues that pursuant to section 775.15, Florida Statutes, in determining whether service of *capias* was executed without unreasonable delay, the State is only required to prove that the Petitioner was absent from the State. The State maintains that they did this through the Petitioner's own admission at the Case Disposition Hearing that he had been in the State of New York when the State attempted to serve him with a summons.

Section 775.15, Florida Statutes, sets out the statutes of limitations for different degrees of criminal offenses. Section 775.15, Florida Statutes (2005), states in pertinent part,

(2) Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:

(c) A prosecution for a misdemeanor of the first degree must be commenced within 2 years after it is committed.

Section 775.15(5)(b), Florida Statutes, states that in determining whether a *capias* has been executed without unreasonable delay, "the defendant's absence from the state shall be considered" § 775.15(5)(b), Fla. Stat. (2005). Furthermore, section 775.15(6) states that the period of limitation does not run during any time when the defendant is "*continuously* absent from the state." § 775.15(6), Fla. Stat. (2005) (emphasis added).

The State presented no evidence that the Petitioner was continuously absent from the State, thereby tolling the statute of limitations. Because the State offered no evidence at the hearing in support of its claim that attempts were made to locate the Petitioner and execute the *capias*, it

failed to meet its burden. As the court in Ehrlick v. State, 898 So. 2d 237 (Fla. 4th DCA 2005), noted, “[w]ere we to hold otherwise, we would establish precedent that whenever a defendant leaves the jurisdiction for any amount of time between the offense and service of a capias, the State is excused from serving the capias within the applicable statute of limitations.” Ehrlick, 898 So. 2d 237 at fn. 2.

The State’s failure to commence prosecution within two years of the alleged offense bars the State from prosecuting the Petitioner.

Therefore, the Petitioner’s Petition for Writ of Prohibition is GRANTED.

MILLER, KASTRENAKES and RAPP, JJ. concur.