IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL TIMOTHY HOGAN,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2008-667
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

A. JOHNSON, VICE PRESIDING JUDGE:

Appellant Daniel Timothy Hogan was tried by jury in the District Court of Rogers County, Case No. CF-2007-331, and found guilty of First Degree Rape by Instrumentation (Count 1), in violation of 21 O.S.2001, § 1114(A), Lewd Molestation (Count 2), in violation of 21 O.S.Supp.2006, § 1123, Lewd Molestation (Counts 3 and 4), in violation of 21 O.S.Supp.1999, § 1123, Lewd Molestation (Count 5), in violation of 21 O.S.Supp.1992, § 1123, and Forcible Sodomy (Count 7), in violation of 21 O.S.Supp.1999, § 888.[1] The jury fixed punishment at life imprisonment without the possibility of parole on Count 1, and twenty years imprisonment on each of Counts 2, 3, 4, 5, and 7. The Honorable Dynda Post, who presided at trial, sentenced Hogan accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, Hogan appeals.

[1] Hogan was found not guilty on Count 6, First Degree Rape.

Background

In 1994 Appellant Hogan married Carrie Spencer and moved in with her and her three daughters, ABK, JB, and LB. Each girl had a learning disability and attended special education classes while in school.[2] According to ABK, Hogan molested her twice when she was seven or eight years old. She claimed that Hogan touched her vagina on top of and underneath her jeans and panties. ABK said that she told the parent of one of her friends what had happened a couple of years after the incident; the parent apparently never reported the molestation to the police.

In 1999, when ABK was thirteen, Hogan entered ABK's bedroom and after telling her that he loved her asked her about performing fellatio. Hogan then placed his penis in her mouth for a few seconds. ABK testified that she fell asleep afterwards only to awake to Hogan on top of her, having sex with her.[3] ABK said that she told the same friend's parent what Hogan had done a couple of months after the sodomy/rape incident and the parent, again, did not report the molestation to the police.

Hogan molested JB on five or six occasions in 1999 when she was seven or eight years old. JB recalled that Hogan put his hand underneath her pants and panties and rubbed her vagina during these incidents. The molestation then ceased for a number of years until JB was fourteen years old. Sometime between 2005 and 2006, Hogan tried again to put his hand down JB's pants.

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[2] Spencer testified that ABK and LB worked at a second grade level and that JB needed special education classes only in math. (Tr. 217-18)

She resisted and told him to stop and he complied. Hogan told JB not to tell anyone and she obeyed because she was afraid of Hogan.

Early in 2007 Hogan molested LB when she was thirteen. LB recalled three different occasions where Hogan placed his hand underneath her pants and panties, touching her vagina. During a fourth incident, Hogan put a vibrating "dildo" inside LB's vagina. LB testified that Hogan inserted the vibrator in her vagina on one other occasion. Hogan told LB that if she told anyone he would hurt her and her mother.

Eventually LB told her sister ABK, then 20 years old, what Hogan had done to her. A Rogers County deputy went to Hogan's residence and spoke separately with LB and Hogan after receiving an anonymous tip. The day after these initial interviews, Hogan attempted suicide.

1. Statute of Limitations

Hogan claims that prosecution of Counts 3, 4 and 5 for Lewd Molestation and Count 7 for Forcible Sodomy was barred by the statute of limitations. While Hogan never raised this issue at trial, the statute of limitations is a jurisdictional bar to prosecution, and unless expressly waived, may be raised for the first time on direct appeal.[4] *See Cox v. State*, 2006 OK CR 51, ¶¶ 7-9, 152 P.3d 244, 248-49. "[O]nce asserted, the presumption is that the statute [of limitations] has run and the State has the obligation to overcome this

[3] This act of intercourse was the basis for the first degree rape charge alleged in Count 6 and for which Hogan was acquitted.

[4] There is no evidence to support a finding that Hogan waived the statute of limitations.

presumption." *State v. Day*, 1994 OK CR 67, ¶ 14, 882 P.2d 1096, 1098. *See also Horn v. State*, 2009 OK CR 7, ¶ 46, 204 P.3d 777, 787.

Under the relevant statutes of limitation prosecution for each of the three counts of Lewd Molestation must have commenced within five years after discovery of the crime and the count of Forcible Sodomy must have commenced within seven years of the discovery of the crime. *See* 22 O.S.Supp.1994, § 152; 22 O.S.1991, § 152. In *Day* we held that "discovery of the crime" for purposes of § 152 occurs "when any person (including the victim) other than the wrongdoer or someone in *pari delicto* with the wrongdoer has knowledge of both (i) the act and (ii) its criminal nature." *Day*, 1994 OK CR 67, ¶ 12, 882 P.2d at 1098. The *Day* court also held that "the crime has not been discovered during any period that the crime is concealed because of fear induced by threats made by the wrongdoer, or anyone acting in *pari delicto* with the wrongdoer." *Id.* at ¶ 13.

According to the testimony at trial, Counts 3 and 4 (lewd molestation) committed against JB and Count 7 (forcible sodomy) committed against ABK occurred sometime during 1999. Count 5 (lewd molestation) committed against ABK occurred in 1993 or 1994. The Information alleging these charges was not filed until July 13, 2007. Some eight and thirteen years elapsed between the commission of these crimes and prosecution. Reversal of Hogan's convictions on these counts is required unless the evidence shows either that no one other than Hogan knew about the act or its criminal nature or that Hogan concealed the acts through fear induced by threats.

The evidence is insufficient to overcome the statute of limitations bar on Counts 5 and 7 in this case. The State offered no evidence that Hogan attempted to conceal his criminal act by threatening ABK or that ABK did not have knowledge of the act or its criminal nature; ABK's trial testimony, in fact, proved otherwise. ABK testified that she told an adult about the molestation a couple of years after the incident in 1994 and told the same adult about the sodomy incident within months of its occurrence in 1999. Reporting these incidents to an adult, under the facts of this case, demonstrates an understanding of the criminal nature of Hogan's acts and triggered the limitations period. ABK also testified that Hogan never threatened her to maintain her silence and that the reason she did not tell her mother was that she was afraid that her mother would be mad. Consequently, the five year limitations period for Count 5 and the seven year limitations period for Count 7 was not tolled by threats and expired prior to the State filing the charges in this case in 2007.

Counts 3 and 4 committed against JB in 1999 must also be dismissed. JB testified that she did not tell anyone about the molestation because she was scared of Hogan and he told her not to tell. There was no evidence, however, that JB's fear of Hogan was induced because of threats he made to her rather than the acts he committed against her. Without more, we can find neither that the five year limitations period was tolled based on fear induced by threats made by the defendant nor that the State filed charges prior to the expiration of the five year limitations period.

The State, anticipating a statute of limitations problem if the definition of "discovery" adopted in *Day* were applied, urges us to overrule *Day* in favor of the definition of "discovery" adopted by the Legislature in 2000.[5] We decline this invitation. When adopting the definition of "discovery" in 2000 the Legislature did not include language making that definition retroactive. Without language dictating the new definition of "discovery" applies retroactively, we are bound to presume that the Legislature intended that the new definition apply only to crimes committed after November 1, 2000. *See* 22 O.S.2001, § 3 ("No part of this code is retroactive unless expressly so declared.") As recently as this year we have continued to apply the definition of "discovery" found in *Day*, for crimes committed prior to November 1, 2000. *See Horn v. State*, 2009 OK CR 7, ¶ 46, 204 P.3d 777, 787. Because the prosecution for Counts 3, 4, 5, and 7 were not commenced with the applicable limitations period after discovery of the crimes, Counts 3, 4, 5 and 7 are reversed and remanded with instructions to dismiss.

2. Trial Court's Decision to Run Sentences Consecutively

Hogan contends the trial court abused its discretion by refusing to consider the imposition of concurrent prison terms and ordering his sentences to run consecutively. Hogan maintains that the trial court decided before trial, pursuant to the court's policy, that if he exercised his right to jury trial and was convicted of multiple counts, his sentences would run consecutively.

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[5] "'[D]iscovery' means the date that a physical or sexually related crime involving a victim under the age of eighteen (18) years of age is reported to a law enforcement agency, up to and including one (1) year from the eighteenth birthday of the child." 22 O.S.Supp.2000, § 152 (G).

We begin by noting "that the sentencing judge shall, at all times, have the discretion to enter a sentence concurrent with any other sentence." 22 O.S.2001, § 976. "It is well established that this Court will not disturb the discretionary rulings of the trial court without a showing that such rulings were arbitrary or capricious." *Wolfenbarger v. State*, 1985 OK CR 143, ¶ 6, 710 P.2d 114, 115-116. A trial court abuses its discretion when it abdicates its discretion in order to advance a "courthouse policy." *See Flett v. State*, 1988 OK CR 150, ¶ 5, 760 P.2d 205, 206 (finding a trial court abused its discretion by following a courthouse policy requiring jail time for every adult convicted of driving while intoxicated); *Gillespie v. State*, 1960 OK CR 67, ¶ 16, 355 P.2d 451, 456 (finding an abuse of discretion when the trial court failed to consider the showing made in support of an application for suspended sentence because the defendant exercised his right to trial by jury).

Hogan claims the trial court's pre-trial comment made during plea discussions is evidence that the trial court had a policy of refusing consideration of concurrent sentences if the defendant went to jury trial.[6] Hogan, however, ignores the trial court's comments at sentencing. At sentencing, the State advocated for consecutive sentences while the defense made its case for concurrent sentences. In making its decision the trial court stated: "I do have a more than vivid memory of the testimony in this case of

[6] After advising Hogan on the record of the deal the State was offering the Court stated: "All right. Mr. Hogan, do you understand that with seven counts going forward that if you receive a guilty verdict on each one that they will not be run concurrent if the jury doesn't recommend concurrent. I've never had a jury do that since I've become a judge. That I won't make them concurrent. It would be consecutive, unlike this plea agreement today. Do you understand that?"

the years of bad treatment and nightmare experiences that these little girls suffered at the hands of Mr. Hogan and I do find the sentences should be consecutive just based upon the facts." The trial court's statement demonstrates to us that the trial court used facts to exercise its discretion rather than some arbitrary or capricious courthouse policy. We find no relief is warranted here.

3. Excessive Sentence

Hogan claims that his sentence is excessive and asks that it be modified in the interest of justice. "A sentence within the statutory range will be affirmed on appeal unless, considering all the facts and circumstances, it shocks the conscience of this Court." *Head v. State,* 2006 OK CR 44, ¶ 27, 146 P.3d 1141, 1148. When the counts barred by the statute of limitations are eliminated from the equation, Hogan's remaining sentence totals life imprisonment without the possibility of parole plus twenty years. The evidence showed that Hogan sexually abused his three step-daughters, who suffered various degrees of mental impairment, both when they were young children and again when they were teenagers. He resided in their home and served as a constant reminder of the abuse he had inflicted. While no evidence was presented of any prior convictions, the long term effect of Hogan's crimes on his victims is far reaching. Hogan's sentence does not shock our conscience under the facts and circumstances of this case.

DECISION

The Judgment and Sentence of the District Court on Counts 1 and 2 is **AFFIRMED**. The Judgment and Sentence of the District Court on Counts 3, 4, 5 and 7 is **REVERSED** and **REMANDED** with instructions to dismiss. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY
THE HONORABLE DYNDA POST, DISTRICT JUDGE

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LUMPKIN, J.: Concur in Results
CHAPEL, J.: Concur in Results
LEWIS, J.: Concur

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