

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY

State v. Berry

2021-Ohio-2588 (Ohio Ct. App. 2021) · No. 109873 · Decided July 29, 2021

SUMMARY

The Ohio Eighth District Court of Appeals affirmed the dismissal of an indictment against Albert Berry on statute-of-limitations grounds. The court held that the State failed to establish reasonable diligence in executing the summons or warrant as required by former R.C. 2901.13(E), and that post-expiration law-enforcement efforts and Berry’s alleged evasion did not make the prosecution timely. The court did not address Berry’s alternative claim of unjustifiable preindictment delay.

CASE DETAILS

|                       |                                                                                                                                                                                                                 |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County                                                                                                                                            |
| WRITING FOR THE COURT | Eileen A. Gallagher, J.; Mary J. Boyle, A.J.; Kathleen Ann Keough, J.                                                                                                                                           |
| JURISDICTION          | Ohio                                                                                                                                                                                                            |
| DECIDED               | July 29, 2021                                                                                                                                                                                                   |
| DOCKET                | 109873                                                                                                                                                                                                          |
| DISPOSITION           | affirmed                                                                                                                                                                                                        |
| PROCEDURAL POSTURE    | The State of Ohio appealed the Cuyahoga County Court of Common Pleas' order granting Berry's motion to dismiss the indictment for failure to commence prosecution within the applicable statute of limitations. |
| STANDARD OF REVIEW    | The appellate court deferred to the trial court's factual findings but reviewed de novo its legal conclusions and application of the facts to the law.                                                          |
| PRECEDENTIAL VALUE    | Published Ohio appellate opinion; precedential within the Eighth Appellate District subject to Ohio law governing appellate precedent.                                                                          |
| PARTIES               | State of Ohio v. Albert Berry                                                                                                                                                                                   |

TOPICS

- criminal procedure
- statutory interpretation
- appellate procedure
- standard of review
- preservation of error

## PRACTICE AREAS

criminal law

criminal procedure

statute of limitations

appellate practice

## QUESTIONS PRESENTED

1. Whether the State timely commenced the prosecution under former R.C. 2901.13(E) by indicting Berry and issuing a summons or warrant without establishing reasonable diligence in executing that process.
2. Whether post-indictment law-enforcement efforts could establish reasonable diligence sufficient to toll the statute of limitations.
3. Whether the statute of limitations was tolled under former R.C. 2901.13(G) because Berry purposely avoided prosecution.

## HOLDINGS

1. A prosecution is not commenced merely by returning an indictment or issuing a summons or warrant; the State must also exercise reasonable diligence in issuing and executing the process. The State failed to meet that burden here.
2. The State failed to establish reasonable diligence even when the court considered efforts made after the natural expiration of the statute of limitations.
3. The statute of limitations was not tolled under former R.C. 2901.13(G) because Berry's false name during a 2016 traffic stop did not establish that he purposely acted to prevent timely prosecution.

## KEY QUOTATIONS

*“Under former R.C. 2901.13(E), a prosecution is not “commenced” merely by the return of an indictment or the issuance of a summons or warrant.” (¶ 47)*

*“It is commenced by the issuance of a summons or warrant plus the exercise of reasonable diligence to execute the same.” (¶ 48)*

*“Accordingly, the effort to serve Berry with the summons via Federal Express on December 30, 2014 did not constitute reasonable diligence.” (¶ 52)*

*“The only reason Berry was ultimately arrested was because he committed an unrelated traffic violation.” (¶ 63)*

*“Because the state did not meet its burden of establishing that it exercised reasonable diligence in executing the summons or warrant or that the statute of limitations was tolled due to Berry’s purposeful efforts to avoid prosecution, the trial court did not err in granting Berry’s motion to dismiss.” (¶ 73)*

## FACTUAL BACKGROUND

The alleged rape and kidnapping occurred on January 8, 1995, and police identified Berry as a suspect and arrested him approximately one month later, but the victim initially declined to pursue charges. The State took no further action until the rape kit was submitted for testing in 2012, and Berry was indicted on December 30, 2014, shortly before the applicable twenty-year limitations period expired. The summons was sent by Federal

Express to an address that was returned as bad, and the State made only limited subsequent efforts to locate Berry before he was arrested after an unrelated traffic stop in December 2016. The record showed that Berry had lived openly in Cuyahoga County and did not establish that he purposely concealed his identity or whereabouts to avoid prosecution.

## PROCEDURAL HISTORY

Berry was indicted in 2014 for rape, attempted rape, and kidnapping arising from a 1995 incident. After his convictions were vacated on ineffective-assistance grounds, the trial court permitted him to file a statute-of-limitations motion. Following an evidentiary hearing, the trial court dismissed the indictment, concluding that the State had not exercised reasonable diligence in executing the summons or warrant. The Eighth District affirmed.

## DISPOSITION

affirmed

## CASES CITED

- State v. Berry, 8th Dist. Cuyahoga No. 106415, 2018-Ohio-4855
- State v. Berry, 2019-Ohio-3263, 129 N.E.3d 470
- State v. Berry, 2020-Ohio-366, 138 N.E.3d 1177
- Cleveland v. Bermudez, 8th Dist. Cuyahoga No. 109018, 2020-Ohio-4296
- State v. Kehoe, 8th Dist. Cuyahoga No. 106385, 2018-Ohio-3589
- State v. Copeland, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234
- State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A., 85 Ohio St.3d 582, 586, 709 N.E.2d 1192 (1999)
- Toussie v. United States, 397 U.S. 112, 114-115, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970)
- State v. Hensley, 59 Ohio St.3d 136, 138, 571 N.E.2d 711 (1991)
- State v. Hawkins, 2019-Ohio-5133, 150 N.E.3d 519
- State v. Morris, 20 Ohio App.3d 321, 322-323, 486 N.E.2d 168 (10th Dist. 1984)
- Sizemore v. Smith, 6 Ohio St.3d 330, 332, 453 N.E.2d 632 (1983)
- State v. Stevens, 8th Dist. Cuyahoga No. 67400, 1994 Ohio App. LEXIS 5772
- State v. Pannell, 2017-Ohio-4286, 92 N.E.3d 280 (5th Dist.)
- State v. Greer, 2 Ohio App.3d 399, 442 N.E.2d 473 (1st Dist. 1981)
- State v. Gallant, 174 Ohio App.3d 264, 2007-Ohio-6714, 881 N.E.2d 907 (3d Dist.)
- State v. King, 103 Ohio App.3d 210, 212-213, 658 N.E.2d 1138 (10th Dist. 1995)
- State v. Myers, 8th Dist. Cuyahoga No. 87973, 2007-Ohio-279
- State v. McNichols, 5th Dist. Stark No. 2000CA00058, 2000 Ohio App. LEXIS 4071
- State v. Jackson, 8th Dist. Cuyahoga No. 86755, 2006-Ohio-2468
- State v. Jenkins, 5th Dist. Stark No. 2009-CA-00150, 2010-Ohio-2719

- State v. McGhee, 5th Dist. Delaware No. 00CA-A-12-040, 2001 Ohio App. LEXIS 2813
- State v. Bess, 126 Ohio St.3d 350, 2010-Ohio-3292, 933 N.E.2d 1076, ¶ 24

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