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DISTRICT II

December 11, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1063-CR State of Wisconsin v. Demetrius N. Ozier (L.C. #2013CF647)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Demetrius Ozier appeals from amended judgments convicting him of two counts of first-degree intentional homicide and four counts of attempted first-degree intentional homicide and from an order denying his postconviction motion seeking to vacate the attempted homicide convictions. On appeal, Ozier argues that the statute of limitations on the attempted homicides expired before the prosecution commenced. After an evidentiary hearing, the circuit court

denied Ozier's motion because Ozier's lengthy absence from Wisconsin tolled the statute of limitations such that the prosecution was timely commenced. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We agree with the circuit court and affirm.

Postconviction, Ozier argued that the statute of limitations expired on the attempted homicides before the prosecution began with the filing of a complaint on April 30, 2013. Ozier committed all of the crimes on July 17, 2005. At that time, a prosecution for an attempted first-degree intentional homicide had to commence within six years of the offense or be time-barred. WIS. STAT. § 939.74(1) (2005-06); *State v. Larson*, 2011 WI App 106, ¶16, 336 Wis. 2d 419, 801 N.W.2d 343 (the six-year statute of limitations in § 939.74(1) applied to prosecutions for attempted first-degree intentional homicide). However, the statute of limitations excluded the time “during which the actor was not publicly a resident within this state.” WIS. STAT. § 939.74(3) (2005-06). The State must prove by a preponderance of the evidence the time during which the defendant was not a public resident of the state. *State v. MacArthur*, 2008 WI 72, ¶50, 310 Wis. 2d 550, 750 N.W.2d 910. We review the circuit court's findings of fact for an erroneous exercise of discretion. *Id.*, ¶52. Whether the facts found by the circuit court tolled the statute of limitations presents a question of law that we decide independently of the circuit court. *Id.*

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

The parties agree that under WIS. STAT. § 939.74(3) (2005-06), the limitations period was tolled while Ozier was not publicly a resident of the state. The law relating to the statute of limitations for attempted homicide changed in 2012 when the legislature amended § 939.74 to exempt attempted first-degree intentional homicide from the six-year limitations period. 2011 Wis. Act 282, § 2 (§ 939.74(2)(a)2, created effective April 27, 2012) (hereafter “the Act”). Section 5 of the Act states that the “act first applies to an act for which the time limit under section 939.74(1) of the statutes for prosecution has not expired as of the effective date of this subsection.” 2011 Wis. Act 282, § 5. The question then becomes whether the six-year limitations period for the attempted first-degree intentional homicides expired before April 27, 2012, the effective date of the Act that eliminated the six-year limitations period.

The circuit court found that Ozier was not publicly a resident of the state for 724 days as follows: 104 days because Ozier was absent from the state from July 17, 2005 until late October 2005 and 620 days from late October 2005 to July 13, 2007 (an absence Ozier concedes). Ozier’s concession that he was absent from the state for 620 days is sufficient to bring the Act’s provisions into play. An absence of 620 days yields the following result: the limitations period ran for 104 days from the offense date, July 17, 2005, to late October 2005; the limitations period was tolled for 620 days from late October 2005 to July 13, 2007; applying the remaining days of the six-year statute of limitations² from July 2007 takes the deadline to commence proceedings to March 2013. Because the six-year statute of limitations for the

² Six years reduced by the 104 days during which the limitations period ran.

attempted homicides had not expired before April 27, 2012, the effective date of the Act, the statute of limitations no longer applied to the attempted homicides by the time the complaint was filed on April 30, 2013.

We uphold as a proper exercise of discretion the circuit court's findings of fact regarding the period during which Ozier was not publicly a state resident. *MacArthur*, 310 Wis. 2d 550, ¶52. The circuit court properly applied the law to the facts. We conclude that the statute of limitations did not apply to the attempted homicides charged on April 30, 2013.

Ozier seeks a new trial in the interest of justice based on his contention that the attempted homicides should have been dismissed as time-barred. Because the prosecution of those crimes was not time-barred, we deny Ozier's request for a new trial.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals