
CASE NO. A-15-001001

IN THE NEBRASKA COURT OF APPEALS

ROSARIO BETANCOURT-GARCIA, Appellant

v.

THE STATE OF NEBRASKA, Appellee

FILED

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CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

APPEAL FROM THE DISTRICT COURT OF
MADISON COUNTY, NEBRASKA
Case No. CR 13-197

Honorable Mark A. Johnson, District Judge

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE BASIS OF JURISDICTON

The Appellant herein reasserts his Statement for the Basis of Jurisdiction as set forth in his Brief of Appellant.

STATEMENT OF THE CASE

The Appellant herein reasserts his Statement of the Case as set forth in his Brief of Appellant.

PROPOSITIONS OF LAW

I.

A FUGITIVE WHO EXECUTES A FORMAL AND VOLUNTARY CONSENT TO EXTRADITION REGAINS THE BENEFIT OF THE STATUTE OF LIMITATIONS.

United States v. Catino, 735 F.2d 718 (2nd Cir. 1984).

II.

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION GUARANTEES EVERY CRIMINAL DEFENDANT THE RIGHT TO EFFECTIVE ASSSISTANCE OF COUNSEL.

State v. Becerra, 253 Neb. 653, 573 N.W.2d 397 (1998).

III.

WHETHER A CLAIM FOR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL MAY BE DETERMINED ON DIRECT APPEAL IS A QUESTION OF LAW.

State v. Duncan, 293 Neb. 359, 878 N.W.2d 363 (2016).

IV.

IN REVIEWING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, AN APPELLATE COURT DECIDES ONLY QUESTIONS OF LAW: ARE THE DISPUTED FACTS CONTAINED WITHIN THE RECORD SUFFICIENT TO

CONCLUSIVELY DETERMINE WHETHER COUNSEL DID OR DID NOT PROVIDE EFFECTIVE ASSISTANCE AND WHETHER THE DEFENDANT WAS OR WAS NOT PREJUDICED BY COUNSEL'S ALLEGED DEFICIENT PERFORMANCE?

State v. Duncan, 293 Neb. 359, 878 N.W.2d 363 (2016).

State v. Morgan, 286 Neb. 556, 837 N.W.2d 543 (2013).

V.

THE PROVISIONS OF *NEB. REV. STAT.* § 28-313(3) ARE ONLY MITIGATING CIRCUMSTANCES WHICH MAY REDUCE THE PENALTY FOR KIDNAPPING, AND THE EXISTENCE OR NONEXISTENCE OF THE MITIGATING CIRCUMSTANCES IS A MATTER PROPERLY CONSIDERED BY THE COURT AT SENTENCING, NOT THE JURY.

State v. Becerra, 253 Neb. 653, 573 N.W.2d 397 (1998).

VI.

PLAIN ERROR EXISTS WHERE THERE IS ERROR, PLAINLY EVIDENT FROM THE RECORD BUT NOT COMPLAINED OF AT TRIAL, THAT PREJUDICIALLY AFFECTS A SUBSTANTIAL RIGHT OF A LITIGANT AND IS OF SUCH A NATURE THAT TO LEAVE IT UNCORRECTED WOULD CAUSE A MISCARRIAGE OF JUSTICE OR RESULT IN DAMAGE TO THE INTEGRITY, REPUTATION, AND FAIRNESS OF THE JUDICIAL PROCESS.

State v. Jones, 293 Neb. 452, 878 N.W.2d 379 (2016).

STATEMENT OF FACTS

The Appellant herein reasserts his Statement of Facts as set forth in his Brief of Appellant.

ARGUMENTS

I. The Lower Court Erred In Overruling Betancourt's Motion To Quash.

At the outset, it is again important to note, as stated by the Nebraska Supreme Court: [T]he construction of [the statutes of limitations] is liberal to the defendant, . . . ‘not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt.’ *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951) (citing 1 Wharton, *Criminal Procedure* (10th ed.) 15, sec. 367). Nebraska law is clear that the burden is on the State to prove all essential elements of the crime charged, including the fact that the charges were filed within the period specified by the applicable statute of limitations. See *State v. Loyd*, 269 Neb. 762, 768, 696 N.W.2d 860, 867 (2005). As discussed in detail in the Brief of Appellant, Betancourt was charged with three felonies, all of which are subject to a three year statute of limitations as set forth in *Neb. Rev. Stat.* § 29-110 (Reissue 2010).

Nebraska law is clear that “[i]f a complaint alleges a cause of action ostensibly barred by the statute of limitations, such complaint, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.” *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992). The Court further stated that “[i]f a complaint challenged under the statute of limitations, facially shows that a cause of action is barred by the statute of limitations, a plaintiff must allege facts sufficient to avoid the bar of a statute of limitations, and, at trial, must prove facts avoiding the statute of limitations.” *Id.* As discussed in the Brief of Appellant, the State failed to meet its burden.

All three counts in the Amended Information are clearly based on events that occurred on or about November 15, 2003. (T54). In particular, Count III of the Amended Information alleged that on or about November 15, 2003, Betancourt allegedly conspired with Trevino to kidnap Jesus, and at some point during their encounter, used a handgun. (T54). The Amended Information containing the conspiracy count was filed on May 21, 2014. (T54). Despite Appellee's contention, there is no question that on its face, the Amended Information fails to show any facts which would toll the applicable three year statute of limitations, and as such, is "ostensibly barred by the statute of limitations." (T54). Furthermore, the State failed to adduce any such evidence at trial that would toll the statute of limitations, as will be discussed in more detail in Argument II of this Reply Brief.

II. *The Evidence Was insufficient To Support A Finding That Betancourt Was Fleeing From Justice.*

Key to Betancourt's argument is that he voluntarily surrendered to the State of Nebraska by signing a waiver of extradition on May 11, 2004, and this fact is undisputed. (E1; E36). It is also undisputed that after signing this waiver, Betancourt was involuntarily transferred to the INS and subsequently deported. This evidence adduced at trial is more than sufficient to show that Betancourt was not a "person fleeing from justice." Therefore, the State failed in its burden to show any facts that the applicable statute of limitations was tolled.

Again, this is a case of first impression in the State of Nebraska. As discussed in the Brief of the Appellant, the issue has been touched upon by federal courts which found that the limitations period is not tolled during the time an accused makes a good faith effort to surrender himself to authorities. See *United States v. Gonsalves*, 675 F.2d 1050 (9th Cir. 1982) (finding that the accused's good faith effort to surrender as inconsistent with a finding that he had the requisite

specific intent to flee from justice, and noting that criminal limitations statutes are to be ‘liberally interpreted in favor of repose’; see also *United States v. Di Santillo*, 615 F.2d 128, 135 (3rd Cir. 1980). In *United States v. Catino*, 735 F.2d 718 (2nd Cir. 1982), the United States Court of Appeals, Second Circuit, agreed with the above stated principle and further found “that a fugitive who executes a formal and voluntary consent to extradition *regains the benefit of the statute of limitations*. (emphasis added).

Also, the lack of any attempt by Nebraska law enforcement authorities to follow up on Betancourt’s whereabouts upon being transferred to INS custody on or after May 17, 2004, further lends support to Betancourt’s argument that the State failed to meet its burden to show the statute of limitations was tolled in the case at bar. Again, in *United States v. Sotelo-Salgado*, 201 F.Supp.2d 957 (S.D. Iowa 2002), the United States District Court of the Southern District of Iowa found that it would be “fundamentally unfair and would defy the purpose of both the statute of limitations and the tolling statutes” to allow the government, who knew of the defendant’s crime for over seven years, to do virtually nothing to bring the accused to justice but then attempt to gain the benefit of the tolling statute because the accused used false names on two occasions. The Court further noted that “[f]airness and the purpose of section 3290 would be undermined if the accused were held responsible for delays which are attributable to the actions, or more accurately, the inaction of law enforcement.” *Id.* at 965; see also *State v. Bobo*, 872 So.2d 1052 (La. 2004) (finding that the lower court erred in overruling Bobo’s motion to quash and held that because the Texas authorities properly executed the extradition papers for Bobo’s return to Louisiana, the State of Louisiana failed to meet its burden of proving that the applicable prescriptive period was tolled) and *Emery v. State*, 138 Neb. 776, 295 N.W. 417 (1940) (finding

the failure to arrest the accused due to the negligence of law enforcement holding the warrant and not anything the accused did was not sufficient to toll the statute of limitations).

Again, it is undisputed that Betancourt waived extradition to Nebraska on May 11, 2004, whereby he voluntarily surrendered to the State of Nebraska. (E1; E36; 33:24-25; 545:23-546:18; 548:3-4). Upon Betancourt's executing the waiver of extradition, he regained the benefit of the applicable statute of limitations. Thereafter, it is undisputed that any delays were the result of the inaction of law enforcement, not Betancourt. It is, again, undisputed that the Madison County Sheriff's office only arranged for a transportation agency to go to Plano, Texas to get Betancourt six days later. (34:3-7; 34:17; 547:24-548:11). Again, it is undisputed that on or about May 11, 2004, the Madison County Sheriff's office pulled Betancourt's arrest warrant off the "teletype system". (35:4-7). It is also undisputed that on May 17, 2004, the Plano police department transferred Betancourt's custody to INS, and he was involuntarily detained by INS. (E3; 34:9-15; 37:3-4; 508:17-23; 548:7-9; 549:12-16). It is clear from the record that Nebraska's lack of any further action resulted in Betancourt subsequently being deported. Accordingly, the State failed to satisfy its burden to show, beyond a reasonable doubt, that Betancourt was "fleeing from justice," thereby tolling the applicable statute of limitations. Betancourt's good faith effort to surrender himself to the State of Nebraska by waiving extradition "tips the balance of the issue of tolling" under *Neb. Rev. Stat.* § 29-110 in favor of Betancourt's "right to avoid perpetual jeopardy." To find the State met its burden on the facts of this case violates the very essence behind statutes of limitations in criminal cases, as well as Betancourt's Due Process rights as guaranteed to him by the Nebraska and United States Constitutions.

III. *Betancourt's Claims Of Ineffective Assistance Of Counsel Have Merit.*

Here, the record is sufficient to adequately review Betancourt's claims of ineffective assistance of counsel. As stated by this Court, "[a]ppellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial." *State v. Casares*, 291 Neb. 150, 155, 864 N.W.2d 667, 673 (2015). The record clearly shows the MCPD dismissed Betancourt's appeal on the Motion for Absolute Discharge prior to it being heard on its merits by the Nebraska Court of Appeals (see also *State v. Rosario Betancourt-Garcia*, Case No. A-14-4, filed in the Nebraska Court of Appeals). Further, as pointed out by the Appellee in its Brief, the record also clearly shows the MCPD further failed to file a Motion to Quash Counts I and II of the Amended Information on statute of limitations grounds. As discussed previously, the facts are undisputed that Betancourt signed a waiver of extradition, voluntarily surrendering himself to the State of Nebraska, on May 11, 2004. (T38). And accordingly, once Betancourt executed his formal and voluntary consent to extradition, he then regained the benefit of the statute of limitations. See *United States v. Catino*, 735 F.2d 718 (2nd Cir. 1984).

Any attorney with ordinary training and skills in the area of criminal law would have filed a Motion to Quash as to Counts I and II on statute of limitation grounds in light of Betancourt's execution of a waiver of extradition on May 11, 2004. But for this deficient performance of Betancourt's trial counsel, the results of the proceedings would have been much different. Thus,

the record is sufficient to conclusively determine that Betancourt's trial counsel did not provide effective assistance and that he was prejudiced by his trial counsel's deficient performance.

IV. The Lower Court Erred In Determining The Kidnapping Charge Was A Class IA Felony.

Again, in pertinent part, *Neb. Rev. Stat. § 28-313(3)* provides, "If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony." It is undisputed from the trial testimony, and the State conceded at sentencing and on appeal, that Jesus did not suffer any serious bodily injury. (Supp. 14:18-19). At the lower court, the evidence further supports that Jesus was voluntarily released and liberated alive by his alleged abductors. Betancourt and Trevino then left Jesus at this shed, physically unharmed. (T4; 368:20-24; 369:9-20; 372:6-18; 374:11-13; 411:4-6; 495:12-14). Again, it is undisputed that Jesus was not locked in the shed when Betancourt and Trevino left him there, nor was he bound to anything in the shed. (505:1-8). Because the evidence at trial showed that Jesus was voluntarily released, alive, by Betancourt and/or Trevino, in a safe place without having suffered any bodily injury whatsoever prior to trial, the mitigating factors set forth in *Neb. Rev. Stat. § 28-313(3)* were satisfied. As such, Betancourt should have been found guilty of a Class II felony and accordingly sentenced to a term of years. And as such, Betancourt's conviction must be reversed and the matter remanded accordingly.

V. There Was No Plain Error In The Classification Of, And The Sentence For, Betancourt's Conspiracy Conviction.

An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. See *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016). To skirt this rule, the Appellee attempts to argue that the

plain error doctrine applies to invite this Court to address the issue of whether the conspiracy charge was a Class IA felony with a mandatory sentence of life imprisonment. This Court should decline the invitation as the Appellee fails to show that, if there is any such error, it is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

CONCLUSION

Based upon the above and foregoing, Rosario Betancourt-Garcia, the Appellant, respectfully requests this Court reverse the lower court's rulings, and set aside his convictions, and remand accordingly.

Respectfully submitted,

ROSARIO BETANCOURT-GARCIA, Appellant
ALBIN LAW OFFICE,
His Attorneys.

By

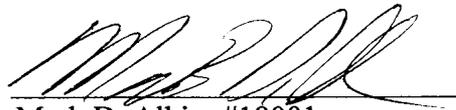


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PROOF OF SERVICE

The undersigned hereby certifies that on the 11th day of August, 2016, a copy of the Brief of Appellant in the above entitled case were served upon the Appellee by depositing said copies in the United States Mail, duly addressed to the following:

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