No. 120797
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	On appeal from the Appellate Court, Second District, No. 2-15-0456
Plaintiff-Appellee,	
v.	There on appeal from the Circuit Court of The Eighteenth Judicial Circuit, of DuPage County, Illinois Trial Court No. 2014-CF-2204
FERNANDO CASAS, JR.,	The Honorable Liam C. Brennan,
Defendant-Appellant.	Judge Presiding.

REPLY BRIEF

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ORAL ARGUMENT REQUESTED

ARGUMENT

I.

The Appellate Court erred when it reversed the trial court and departed from 26 years of precedent when it found that the offense of violation of bail bond was a continuing offense which tolled the three year statute of limitations period.

A. The State misread section 725 ILCS 5/110-10(a).

Section 5/110-10 states the conditions of bond *inter alia:*

> (a) If a person is released prior to conviction, either upon payment of bail security or on his or her own recognizance, the conditions of the bail bond shall be that he or she will:
> (1) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court . . .

725 ILCS 5/110-10 (1998). The State misread that section and argued incorrectly that it applied to the *violation* of bail bond statute 32-10 and thus 32-10 was a continuing offense. That analysis is wrong as 110-10(a) applies to the underlying offense. (State Br. 5) In other words, Mr. Casas had to come to court to answer to the charge of delivery of a controlled substance. That is his duty for his controlled substance charge. That language does not apply to the violation of bail bond statute.

But, the separate and distinct offense of violation of bail bond could have been filed after 30 days had passed since Mr. Casas failed to appear in court. 720 ILCS 5/32-10(a)(West 1998). The violation of bail bond is a separate charge with separate elements to be proved. Illinois Pattern Jury Instructions-Criminal 4th, No. 22.54(2000). The distinction between the underlying offense and the

violation of bail bond is further noted as a defendant can be convicted for a violation of bail bond even though he is acquitted of the underlying offense. *People v. Tompkins,* 26 Ill.App.3d 322, 324 (4th Dist. 1975).

For the State to argue that a "violation of that duty, following a thirty-day grace period, was a felony" is incorrect. (State Br. 5) It is not automatically the felony offense of violation of bail bond. As section 110-16 notes,

> If a person admitted to bail on a felony charge forfeits his bond and fails to appear in court during the 30 days immediately after such forfeiture, on being taken into custody thereafter he shall not be bailable in the case in question, unless the court finds that his absence was not for the purpose of obstructing justice or avoiding prosecution.

725 ILCS 5/110-16. (1998). Thus, even after 30 days a person is bailable if the absence is not willful.

B. Prompt prosecution was available

The State illogically argued that "[I]t is the *defendant's* conduct that impedes prompt prosecution." (State Br. 7) The offense of violation of bail bond occurs in court, in the presence of the State, the Defense attorney, the judge and the court personnel. Moreover, a violation of bail bond is an incredibly easy charge to file: the crime is known, and the offender is known. It is in the State's power to file an information or indictment. When Mr. Casas did not return to court the State waited another six months before it tried him *in absentia.* Never in that six months of continuing the case, or having an empty chair at counsel table during the trial *in absentia,* or thereafter did the State file a violation of bail bond.

C. The three year statute of limitations for violation of bail bond neither rewards nor shields violators of bail bond

The three year statute of limitations applicable to a violation of bail bond does not "shield a wrongdoer." (State Br. 7-8) There is no shield because there is nothing to shield. Everything is known to the State. It is a deadline and filing the information within three years of the violation would have tolled the statute. *People v. Pacheco*, 338 Ill.App.3d 616 (2nd Dist. 2003).

D. There are statutes which include continuing offense language

The State argued that the Defense did not point to any Illinois statutes whose definitions include that they are continuing offenses. (State Br. 10) The State was careful and did not make the argument that none existed because of course, some do exist. The following include language that they are continuing offenses: 720 ILCS 5/16H-50;16H-55; 16H-60; 720 ILCS 5/17-10.6(h)(i); and 750 ILCS 16/55 (2016).

E. Custodial status

A person on bond is not in custody despite the State's assertions to the contrary as a violation of bail bond is different from escape. (State Br. 13) A violator of bail bond gets notice from the court after the initial absence and gets a chance to explain to the court and establish by a preponderance of the evidence his absence was not intentional 725 ILCS5/110-7 (g); 725 ILCS 5/110-3(1998). There is no due process for an escaped person.

Escape is defined as:

> A person convicted of felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution . . . however, a person

> convicted of a felony who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement . . . .

720 ILCS 5.31-6 (a) (1998). For the State to argue that furlough or work and day release programs or home confinement do not put a person in custodial status is a gross misapprehension of the reality of those circumstances. (State Br. 13) Indeed, the Code of Corrections reiterates that failure to comply with home monitoring is considered escape. 730 ILCS 5/5-8A-4.1 (1998). The legislative intent for escape is quite clear: custodial status.

E. Other jurisdictions

Other state decisions are only persuasive if there is *no Illinois authority on point. K&K Iron Works, Inc. v. Marc Realty, LLC,* 2014 IL App (1st) 133688, ¶47. (emphasis added) In this case, there was longtime Illinois authority from the Appellate Court in *People v. Grogan*, 197 Ill.App.3d 18 (1st Dist. 1990). Neither the Appellate Court's ruling in *Casas* nor the State has given a reason that public policy requires that longstanding law be disturbed.

As the State noted, the Appellate Court found that other jurisdictions have held that a violation of bail bond is not a continuous offense. (State Br. 20, ftnt. 3) One of those cases is *People v. Landy,* 125 A.D.2d 703, 704 (N.Y.App.Div. 1986) and in that case, the defendant failed to appear for court in 1978. He returned in 1984 and was tried and acquitted of the underlying charge in 1985. He was then charged with bail jumping in the first degree. The Court found that bail jumping

was " a completed crime when 30 days have expired after the failure to appear." *People v. Landy*, 125 A.D.2d 703, 704 (N.Y. App. Div. 1986).

The State cites numerous cases which have found that crimes similar to failure to appear have been found continuing offenses. The Seventh Circuit has found that failure to surrender for a sentence is a continuing crime but relied on a statutory provision. *United States v. McIntosh,* 702 F.3d 381, 387 (7th Cir. 2012) citing its decision in *United States v. Elliot,* 467 F.3d 688 (7th Cir. 2006). Notably in *Elliot,* the court held,

> Not that it matters whether § 3146(a)(2) is a continuing offense. Another statute, 18 U.S.C. § 3290, provides that "[n]o statute of limitations shall extend to any person fleeing from justice." Elliott became a fugitive, and thus was covered by this rule, as soon as he failed to report for custody. (citation omitted) Section 3290 has exactly the same effect as calling §3146(a) a continuing offense: the period of limitations does not begin to run until the fugitive has been apprehended.

United States v Elliot, 467 F.3d 688, 690 (7th Cir. 2006). Thus in Federal Court there is a specific statute that tolls the statute of limitations when a person fails to report to court. That is not the case in Illinois.

In several of the other cases cited by the State, §3290 is applicable to the decisions. See *United States v. Lopez*, 961 F.2d 1058 (2nd Cir. 1992), *United States v. Martinez,* 890 F.2d 1088 (10th Cir. 1989), and *United States v. Gray,* 876 F.2d 1411 (9th Cir. 1989). (State's Br. 19)

In *United States v. Green*, 305 F.3d 422 (6th Cir. 2002), (State Br. 19) the issue was which year of the Sentencing Guidelines should apply in a failure to appear case. The Sixth Circuit noted that other Circuits found that the failure to

appear was a continuing offense and it cited *United States v. Lopez 961 F.2d 1058 (2nd Cir. 1992)* although it failed to specifically mention that *Lopez* noted that §3290 was part of its holding that no statute of limitations applied to §3146.

The State cited *Ohio v. Wilkinson*, 178 Ohio App.3d 99 (2008) as another jurisdiction which found a state charge of escape to be a continuing offense. (State Br. 19) *Wilkinson* is instructive though on the distinction between violation of bail bond and escape. In that case, the issue was whether the State should have been allowed to amend the indictment which had the effect of greatly expanding the dates of the failure to report which was the basis of the escape charge. The Court held, there was no error in allowing the State to amend the indictment because the dates and time of the offense were "not elements of the crime of escape under R.C. 2921.34(A)(1), the failure to provide an exact date or time is not a basis for dismissing the charge." *Wilkinson,* 178 Ohio App.3d at ¶14.

Yet, in Illinois, unlike *Wilkinson*, the date when the defendant misses court and when he can be charged with violation of bail bond is an element in the offense and in the jury instructions. No violation occurs before 30 days have passed since the forfeiture warrant issued. IPI Criminal 4th, No. 22.54(2000), 725 ILCS 5/32-10(1998). Of course in escape, since a defendant is in custodial status, once he violates it, then he can be charged immediately.

In Illinois, a violation of bail bond is completed, as in *Toussie v. United States*, 397 U.S. 112 (1970), then and there, meaning 30 days after the forfeiture order. The legislature has not indicated via another statute that it is a continuing

offense and *People v. Grogan* has held that it is not a continuing offense. The legislative intent is that a trial *in absentia* is also a remedy for bail jumping and that is precisely what occurred as Mr. Casas is serving a 20 year sentence. No reason was offered as to why the State did not file a violation of bail bond contemporaneously with the trial *in absentia* and thus within the 3 year statute of limitations.

II.

Although not ruled upon by the Appellate Court in *Casas*, the State argued that Mr. Casas was not publicly resident in Illinois and therefore the statute of limitations was tolled.

Contrary to its position in the Superseding Information, the State is now arguing, in the alternative, that the statute of limitations was tolled because Mr. Casas was "not usually and publicly resident within this State," which is a reason under the statute to toll the time. 720 ILCS 5/3-7(a)(1998). (State Br. 20)

In the Appellate Court, Mr. Casas objected to this argument in the brief as being waived, forfeited, and contrary to case law. The Appellate Court in *Casas* held that since it agreed with the State on its first issue, that a violation of bail bond was a continuing offense, then "we need not address the second." *People v. Casas*, 2016 Ill.App. (2d) 150456 ¶9.

This argument is waived as it was not plead in the Superseding Information.(C. 22) Arguments not raised in the lower court are waived. *People v. Enoch*, 122 Ill.2d 176, 186 (1988). An information which lacks all the elements necessary to charge an offense is vulnerable to attack at any time, including on appeal. *People v. Meier*, 223 Ill.App.3d 490, 585 N.E. 2d 232, 235 (5th Dist.

1992). A defective information is reviewed *de novo. People v. McCoy,* 295 Ill. App.3d 988, 692 N.E.2d 1244, 1247 (1998).

The State appears to be referring to the following language in the Superseding Information to support its position "[the]. . . statute of limitations did not start running until April 5, 2014, when defendant was apprehended and admitted that he used false identity to evade prosecution." (C. 22) (State Br. 20)

The Superseding Information is fatally defective as it does not state any dates Mr. Casas was out of state, or which section of the statute the State is invoking to toll the time, or when this false identification was used. This Court has held that certain dates and certain facts must be included in the information as a basis for tolling the limitation period. *People v. Morris*, 135 Ill.2d 540, 547 (1990).

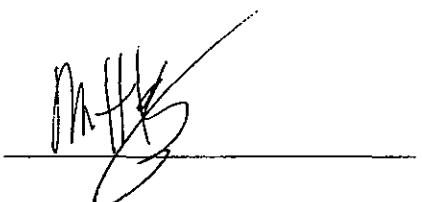
The statutory language "[n]ot usually and publicly resident" has been interpreted to mean that the defendant was out of state. *People v. Meir*, 223 Ill.App.3d 490, 585 N.E.2d 232, 234 (5th Dist. 1992). *See also, People v. Saunders,* 235 Ill.App.3d 661, 670 (1st Dist. 1992)(where the defendant was absent from the state for a year and nine months and the evidence showed the date when he reentered Illinois).

As noted, no facts are alleged in the brief or Superseding Information which enumerate any dates that he was out of state. Therefore, the State has not established any times when Mr. Casas was out of state or what facts it has to support its argument. The Superseding Information was defective as it did not aver sufficient facts, or state the statutory section applicable and this argument thus fails.

CONCLUSION

The Appellate Court's opinion should be reversed and the trial court's order dismissing the Superseding Information should be affirmed.

Respectfully submitted,



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RULE 341 (C) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and(b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a), is 9 pages.

Mark H. Kusatzky

RULE 341 (C) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and(b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a) is 9 pages.

Julie M. Campbell