Cold-case CODIS hits: 6 lessons about statutes of limitations in sexual assaults

In 1995, Texas created the Combined DNA Index System (CODIS).[1] Since that time, cold-case sex crime charges have been on the rise, particularly with the recent push to end the rape kit backlog plaguing our criminal justice system.[2]

By Tiffany Larsen
Assistant District Attorney in Harris County

As older sexual assault cases with newly-obtained DNA evidence appear on our desks, it will be helpful to have a thorough understanding of the statute of limitations that applies in each case. This article aims to tell if and when there is no statute of limitations (SOL) for a particular sex case.[3]

Texas Code of Criminal Procedure Art. 12.01(1)(C)(i) states that there is no SOL on sexual assault if, during the investigation of the offense, these three prongs are met:

1) biological matter is collected,
2) it is subjected to forensic DNA testing, and
3) test results "show that the matter does not match the victim or any other person whose identity is readily ascertained."

This statute became effective September 1, 2001, after House Bill 656 was passed during the 77th Regular Session. The chief purpose of this change was to give prosecutors the "necessary flexibility to take advantage of scientific advances when handling sexual assault cases that involve biological evidence."[4] In some cases, biological evidence may not be subject to a DNA test within the statute of limitations period; thus, the statute recognizes that such evidence can be preserved and accurately tested decades after the offense, making the prosecution of sexual assaults feasible after the standard SOL has expired.

Since this law was enacted, there have been only a handful of cases to assist us in interpreting the meaning and implications of the Legislature's words. Frequently, the holding of the cases are derived from the defendant's arguments, but sometimes we hear these same arguments from those who fail to look beyond the black letter law. In an effort to assist prosecutors to counter such arguments, here are six lessons we have learned from the caselaw on what CCP Art. 12.01(1)(C)(i) really means for the survival of these cold cases.

Lesson No. 1: "Readily ascertained" means "certain," not "ascertainable."

Ex parte Lovings[5] takes much of the guesswork out of understanding the language in Art. 12.01(1)(C)(i), particularly the phrase "readily ascertained."

For some background on the case, the victim was sexually assaulted on October 14, 1998, but defendant Lovings was not formally charged until 2014. At the time of the sexual assault, the suspect was unknown, and a sexual assault kit was collected from the victim the following day. Officers closed the investigation two weeks later because the victim had not responded to phone calls and letters requesting more information.

In October 2013, a CODIS hit occurred. Though the original statute of limitations (10 years) would have expired October 14, 2008, the Court held that under Art. 12.01(1)(C)(i), there was no limitation because Lovings' identity was not ascertained when the DNA kit was tested.

Lovings complained on appeal that the prosecution was barred from charging him outside of the 10-year SOL because his identity "*could have*

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been readily ascertained if the State had looked for it" (emphasis added), as his DNA had been in the CODIS system since April 2001. The Court rejected this argument, and it assigned meaning to the words "readily ascertained" by defining "readily" as "without delay or difficulty; easily" and "ascertain" to mean "to find something out for certain; make sure of." The Court specifically rejected the argument that "ascertained" means "ascertainable" or "can be ascertained," as that would require the Court to modify or change the word chosen by the legislature.

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Lesson No. 2: The statute places no additional due diligence requirements on the State.

Lovings additionally argued on appeal that the language of Art. 12.01(1)(C) "imposes a duty on the State to look for a match," and that if the State fails to diligently look for a DNA match, then Art. 12.01(1)(C) does not apply. Again, though, the Court declined to add or subtract from the plain language of the statute, including placing any additional limitations on the timeframe for testing the biological materials collected in the investigation. Specifically, the Court held that the word "investigation" includes re-opening a case for new information. The Court then noted that because the legislature imposed time limits on investigation in other parts of the Code of Criminal Procedure, "we presume the legislature meant *not* to impose those limits to Art. 12.01(1)(C). ... If the legislature meant to impose additional duties on the State in the circumstances at issue here, it could have done so explicitly" (emphasis added).

Lesson No. 3: Absent meeting the statute's three-prong test, the 10-year SOL applies.

In *Ex parte S.B.M.*,[6] the victim reported being sexually assaulted in March 2003. A sexual assault kit was recovered and sent to the lab at the Department of Public Safety (DPS) for testing, and semen was detected on a vaginal swab and panty liner. Before the kit could be tested, defendant S.B.M. was arrested in September 2003 for the sexual assault after the victim identified him.

After S.B.M.'s arrest, the DNA lab analyst returned a report concluding that there was insufficient male DNA for comparison. The State presented the case for indictment, but a no-bill was returned. Defendant S.B.M. then moved for expunction in April 2013, and the trial court granted his motion. The State appealed, arguing that the Art. 12.01(1)(C)(i) exception applied.

The Court held that although the first two prongs of Art. 12.01(1)(C) had been met, the third had not, as the forensic DNA testing results did not show that the matter did not match any other person whose identity was readily ascertained—instead, the results simply showed nothing. The Court explained that "the plain language of Art. 12.01(1)(C) requires, at a minimum, as a prerequisite to its application, that the biological matter collected contain a sufficient quantity of DNA to enable forensic DNA testing to be performed." The Court concluded that because the three-prong test from Art. 12.01(1)(C)(i) had not been met, the general 10-year sexual assault statute of limitations applied.

Lesson No. 4: Advances in DNA testing may prompt an SOL exception.

The Court went on to clarify in a footnote in *Ex parte S.B.M.*, however, that its holding did not "preclude the possibility that if, through scientific advances in DNA testing, the forensic testing of the biological matter collected from [the victim] is able to yield actual readable test results showing that the DNA profile in the collected biological matter does not match [the victim] or any other person whose identity is readily ascertained, there is no reason Art. 12.01(1)(C) could not apply at that time," and that should this become the case, the defendant could even potentially be charged with the offenses at some point in the future.

The Court's reasoning indicates that the dominant factor in determining whether the exception applies is the result of the testing, not the initial identification of a known suspect ("biological matter is collected and subjected to forensic DNA testing and the *testing results show* ..."). Even where a victim contends she knows for certain her attacker's identity—but prosecutors do not believe they have probable cause to ascertain his identity—the statute allows the State to wait until the testing or further evidence gives that certainty.

Importantly, if the Court's decision in *Ex parte S.B.M.* as to the applicable SOL hinged on

the pre-DNA testing identification of the suspect, the Court's analysis would not include the consideration of the testing results or the ability to obtain clear results in the future. Waiting for DNA results to identify the perpetrator with certainty is in everyone's best interest, especially the defendant's. DNA is reliable, and the legislature and courts recognize this.

Lesson No. 5: Prosecutors may wait to file charges until they are satisfied they can establish a suspect's guilt in the courtroom.

In *Bailey v. State*,[7] the victim reported in July 1999 that an unknown suspect broke into her home and raped her. A sexual assault kit was collected at the hospital immediately following the incident, and the kit and the victim's clothing and cane were submitting for testing at the state crime lab. During the investigation, an informant told police that defendant Bailey had committed the offense, but officers failed to promptly show a lineup to the victim, and she died in 2005. In 2006, a CODIS hit matched Bailey to DNA found on the victim's skirt and cane. Bailey was subsequently indicted in February 2007 and convicted of aggravated sexual assault of an elderly person.

On appeal, Bailey argued that the State had intentionally delayed bringing the charges. But in affirming the defendant's conviction, the Court held that under Art. 12.01(1)(C), the State is not required to conduct a continuous investigation or file charges once it has *probable cause*—instead, prosecutors may file charges when they are satisfied that they can establish the suspect's guilt *beyond a reasonable doubt*. The Court ultimately held there was no due process violation and there is an unlimited statute of limitations under Art. 12.01(1)(C)(i). Though Bailey had been preliminarily identified by an informant and a photo array could have been presented to the victim for identification, the Court based the applicability of Art. 12.01(1)(C) on the ultimate results of the DNA testing, indicating that the preliminary identification of a potential suspect by law enforcement is not the determining factor.

Defense counsel or others may suggest that a defendant's identity was "ascertained" during an investigation, either through speculation based on circumstantial evidence or even through the victim's direct accusation (e.g., "It was a guy named Joe Smith"). However, this argument is inconsistent with the holdings of the appellate courts in *Lovings* and *Bailey*, because this type of evidence supports only a *reasonable suspicion* as to identity, not identity that is "certain." Where prosecutors have only a reasonable suspicion that a suspect is responsible for a sexual assault, his identity has not yet been "ascertained" under the definition the Court assigned to that word in *Lovings*. Specifically, *where a perpetrator has not been properly identified by the victim herself, no direct evidence of the perpetrator's identity had been obtained through any other witness in the case, and no DNA profile has yet been obtained through testing the rape kit,* the perpetrator has not been "ascertained" for purposes of CCP Art. 12.01(1)(C)(i), and there is no statute of limitations for the offense.

Lesson No. 6: There is no deadline imposed on the State for testing a rape kit.

In *Ex parte Montgomery*, [8] the child victim, P.J., was 11 years old (born on December 30, 1977) when she was sexually assaulted by a stranger on October 31, 1989. The crime was reported to the Houston Police Department, and as part of the investigation, P.J. underwent a sexual assault examination, where biological matter was collected and put into storage. In December 2008, that biological matter was sent to a crime lab, and four years later, a Houston police officer requested that the crime lab perform DNA testing on it. The testing was completed in September 2013, and the DNA results were entered into CODIS that November. In December of that same year, there was a match between defendant Montgomery's DNA and the DNA collected during P.J.'s exam. The State indicted Montgomery in June 2015 for aggravated sexual assault of a child.

Montgomery applied for a writ of habeas corpus based on the statute of limitations. At the time of the offense, the statute of limitations for aggravated sexual assault of a child was 10 years from the date of the offense, and was, therefore, set to expire on October 31, 1999. In 1997, however, the statute of limitations was amended to expire 10 years after the date of the victim's 18th birthday. P.J.'s 28th birthday was December 30, 2005—long past—and Montgomery contended the SOL for aggravated sexual assault expired that day. Specifically, he argued on appeal that any testing contemplated by Art. 12.01(1)(C) must be completed prior to expiration of the original statute of limitations.

Where prosecutors have only a reasonable suspicion that a suspect is responsible for a sexual assault, his identity has not yet been "ascertained" under the definition the Court assigned to that word in Lovings.

Given the backlog of sexual assault kits, it is reasonable that the legislature intended to give the survivors of these sex offenses the extra time necessary for proper testing of the biological materials collected in their cases.

The State responded that this case is governed by the exception established in subdivision (1) of Art. 12.01, which took effect September 1, 2001, before the limitations period expired, and the Fourteenth Court of Appeals agreed. Reaffirming its opinion in *Lovings*, the Court declined again to "insert language" into the statute, holding that because "no such deadline is contained in the plain text of Art. 12.01(1)(C)," the Court would not hold any such deadline to apply. Because 12.01(1)(C)(i) was passed in 2001, prior to December 30, 2005, it effectively changed the SOL to no SOL in 2001.

Having worked on many cold-case sexual assault cases, I have seen first-hand the look of genuine shock and dismay on these offenders' faces when they are ultimately charged with a sexual assault they committed so long ago. It is understandable that the defendant will argue, seemingly logically, that the statute of limitations has surely passed. Some may even go as far as to claim that it is unfair to the defendant to delay charges by many years because of an apparent lack of follow-though by law enforcement.

Given the backlog of sexual assault kits, however, it is reasonable that the legislature intended to give the survivors of these sex offenses the extra time necessary for proper testing of the biological materials collected in their cases. *Montgomery* re-confirms the Fourteenth Court's position that there is no deadline imposed on the State for actually testing the kit. Caselaw and the plain language of Art. 12.01(1)(C)(i) support extending the SOL to no statute of limitations in these cases.

Conclusion

There is no worse feeling as a lawyer than missing an important deadline. In prosecution, that feeling is exponentially worse when we have the evidence but we missed the chance to file charges within the SOL. As you review cold-case sexual assaults, I hope these lessons will put you at ease that justice delayed does not always have to be justice denied.

If you have any questions or concerns, please contact the author, Tiffany Larsen (Appellate Division at the Harris County District Attorney's Office) at 713/274-5826. ❇

Endnotes

[1] Tex. Gov't Code §411.142.

[2] According to www.endthebacklog.org/texas, 2,138 untested kits remain out of the 18,955 backlogged kits reported to the Texas Department of Public Safety in August 2017.

[3] In 2007, the limitations period was eliminated entirely for child sexual abuse offenses; see Tex. Code Crim. Proc. Art. 12.01(1). For sexual assault of an adult in cases not covered by Art. 12.01(1)(C), the statute of limitations is 10 years from the date the offense was committed. Tex. Code Crim. Proc. Art. 12.01(2)(E).

[4] House Research Organization Bill Analysis for HB 656 (March 13, 2001).

[5] 480 S.W.3d 106 (Tex. App.–Houston [14th Dist.] 2015, no pet.).

[6] 467 S.W.3d 715 (Tex. App.–Fort Worth 2015, no pet.).

[7] No. 11-11-00020-CR, 2013 WL 398943 (Tex. App.–Eastland, Jan. 31, 2013, pet. ref'd) (mem. op., not designated for publication).

[8] No. 14-17-00025-CR, 2017 WL 3271088 (Tex. App.–Houston [14th Dist.], August 1, 2017, pet. ref'd) (mem. op., not designated for publication).