

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2009-177291-001 DT

09/03/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
J. Eaton  
Deputy

STATE OF ARIZONA

CATHERINE LEISCH

v.

THOMAS MICHAEL BROWN (001)

LAWRENCE KOPLOW

NORTH VALLEY JUSTICE COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number JC 2009–177291 and JC 2009–177292.**

Defendant-Appellant Thomas Michael Brown (Defendant) was convicted in the North Valley Justice Court of contracting without a license. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged the statute of limitations had run. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 14, 2009, the State filed a Complaint in JC 2009–177291 charging Defendant with Contracting Without a License and naming as victims Randy and Nicki Becker. On that same date, the State filed a Complaint in JC 2009–177292 charging Defendant with Contracting Without a License and naming as victims Ray and Gloria Sooman. Both matters were set for trial on Thursday, January 20, 2011. (R.T. of Jan. 20, 2011, at 4.)

On Friday, January 14, 2011, Defendant’s primary attorney filed a Motion To Dismiss for Lack Jurisdiction and Expiration [*sic*] of Statute of Limitations in the Sooman case (JC 2009–177292) alleging the statute of limitations had run. (*Id.* at 4, 7–8, 74–75.) Defendant’s trial attorney told the trial court he was not prepared to proceed with the Becker case (JC 2009–177291) and asked the trial court to continue that matter. (*Id.* at 9.) The prosecutor said he was prepared to proceed on the Sooman case (JC 2009–177292). (*Id.* at 11–12.) The trial court continued the Becker case (JC 2009–177291) to March 31, 2011. (*Id.* at 14–15.)

The trial court then proceeded on the Sooman case (JC 2009–177292) with both the trial and the hearing on the Motion To Dismiss. (R.T. of Jan. 20, 2011, at 15.) Marcie Mitchell testified she was president of Amerifab LLC. (*Id.* at 20.) Prior to June 15, 2007, Tom Frederick owned that business, which was then known as Amerifab Inc. or American Modular Service, but then sold that business to Ms. Mitchell. (*Id.* at 20–21, 23, 24.) When Tom Frederick owned that business, he had a contractor’s license, but that license had been voluntarily canceled as part of the terms of the sale. (*Id.* at 23, 86–87.) After the sale, Tom Frederick still worked for Amerifab LLC, but he was not permitted to use its license for contracting work. (*Id.* at 27.)

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On November 25, 2006, Ray and Gloria Sooman entered into a contract with Defendant and TM Development to purchase the lot at 4333 West Shaw Butte Drive and have Defendant build a home on that lot. (R.T. of Jan. 20, 2011, at 24–25, 32–36, 40–41, 77.) Tom Frederick obtained the building permit using the license he held with Amerifab Inc. or American Modular Service. (*Id.* at 25, 60, –61, 68, 78, 111.) TM Development Group transferred title to the land to the Soomans by means of a warranty deed signed by Defendant and recorded either February 26, 2007, or March 2, 2007. (*Id.* at 47–48.)

In the fall of 2007, Ms. Mitchell began receiving preliminary lien notices for the project at 4333 West Shaw Butte Drive naming American Modular Service as the entity holding the contractor’s license. (R.T. of Jan. 20, 2011, at 21–22.) Ms. Mitchell notified the subcontractors and the City of Phoenix Development Services Department that American Modular Service was not doing that project, and that American Modular Service had not given anyone permission to use its license for that project. (*Id.* at 22–24, 27–28, 58–59, 84–86.) As a result, the Development Services Department put a hold on the building permit. (*Id.* at 38.) By January 2008, Tom Frederick obtained another contractor’s license through his new company, RBW Consultants, and construction on the house resumed. (*Id.* at 40, 54, 55–56, 69–71, 121–22.) The certificate of occupancy was then issued June 2008. (*Id.* at 35.)

On August 11, 2009, the Soomans filed a complaint with the Arizona Registrar of Contractors. (R.T. of Jan. 20, 2011, at 97.) Alex Figueroa was an investigator for the Arizona Registrar of Contractors and was assigned to investigate the Sooman’s complaint. (*Id.* at 95–97.) After investigating, Mr. Figueroa concluded Defendant was operating as a contractor without a license, so he sent the matter to the Maricopa County Attorney’s Office for the filing of charges. (*Id.* at 98.) On December 14, 2009, the State filed Complaints in JC 2009–177291 (the Becker case) and JC 2009–177292 (the Sooman case).

Defendant testified he and his wife Sharon were members of TM Development, which had owned the lot in question. (R.T. of Jan. 20, 2011, at 110.) He noted the building permit had been issued to Tom Fredericks through American Modular Service, and claimed he was only the construction manager. (*Id.* at 111, 116–18, 128.) He said the project was halted in 2007 because either Amerifab or American Modular Service told the City it was not associated with the project. (*Id.* at 118–19.) When Tom Fredericks spoke to personnel at the City of Phoenix, he told them Defendant was not the contractor on the project. (*Id.* at 120.) Defendant said Tom Fredericks set up a new company, RBW Consultants, and obtained a new contractor’s license, and construction resumed under that new license. (*Id.* at 121–23.) Defendant admitted he did not have a contractor’s license during the construction on the house in question. (*Id.* at 128.)

On January 26, 2011, the trial court issued a minute entry in the Becker case (JC 2009–177291) setting trial for March 31, 2011. On January 28, 2011, the trial court issued a minute entry in the Sooman case (JC 2009–177292) denying Defendant’s Motion To Dismiss and finding Defendant guilty of Contracting Without a License. (Verdict, dated Jan. 28, 2011.)

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On March 4, 2011, in both cause numbers, Defendant's attorney filed a Second Motion To Dismiss re Statute of Limitations. That Motion referenced the first motion to dismiss, but noted that second motion included an e-mail Ray Sooman sent to the City of Phoenix Development Services Department on January 7, 2008, and a "flag" report dated December 18, 2007. On March 11, 2011, in both cause numbers, Defendant's primary attorney filed a Supplemental Motion To Dismiss for Lack of Jurisdiction. That motion asked the trial court, in determining the statute of limitation issue in the Becker case (JC 2009-177291), to consider the evidence and testimony presented January 20, 2011, in the Sooman case (JC 2009-177292). On March 22, 2011, the trial court issued a minute entry denying Defendant's Supplemental Motion To Dismiss for Lack of Jurisdiction. (Ruling on Motion, dated Mar. 22, 2011.)

On July 7, 2011, the trial court held the trial in the Becker case (JC 2009-177291) and the restitution hearing in the Sooman case (JC 2009-177292). On July 29, 2011, the trial court issued its ruling on restitution in the Sooman case. (Restitution Ruling and Order, dated Jul. 29, 2011.) On August 17, 2011, the trial court issued its ruling finding Defendant guilty in the Becker case (JC 2009-177291). (Verdict, dated Aug. 17, 2011.) On December 2, 2011, the trial court issued its ruling on restitution in the Becker case (JC 2009-177291). (Restitution Ruling and Order, dated Nov. 2, 2011.)

On November 3, 2011, the trial court entered judgment and imposed sentence in both cases using one document with both cause numbers. (Judgment and Sentence Order, dated Nov. 3, 2011.) On November 15, 2011, Defendant's primary attorney filed a Notice of Appeal and Designation of Record listing only Case No. JC 2009-177291 (the Becker case). On November 29, 2011, Defendant's primary attorney sent to the trial court by fax a Notice of Appeal and Designation of Record listing both Case No. JC 2009-177291 (the Becker case) and Case No. JC 2009-177292 (the Sooman case). This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

## II. ISSUES.

### *A. Does this Court have jurisdiction in the appeal in the Sooman case (JC 2009-177292).*

In its Appellee's Response Memorandum filed January 16, 2013, the State did not raise any issue about this Court's jurisdiction. An appellate court has, however, an independent duty to consider the issue of its jurisdiction on its own motion. *State v. Avila*, 147 Ariz. 330, 333, 710 P.2d 440, 443 (1985); *Fields v. Oates*, 230 Ariz. 411, 286 P.3d 160, ¶ 7 (Ct. App. 2012); *State v. Limon*, 229 Ariz. 22, 270 P.3d 849, ¶ 3 (Ct. App. 2011); *State v. Mohajerin*, 226 Ariz. 103, 244 P.3d 107, ¶ 6 (Ct. App. 2010). Under Rule 4(a) of the Superior Court Rules of Appellate Procedure-Criminal, the notice of appeal must be filed with the trial court within 14 calendar days of entry of judgment and sentence, and this time limit is jurisdictional. *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990); *In re Marriage of Gray*, 144 Ariz. 89, 90, 695 P.2d 1127, 1128 (1985); *State v. Littleton*, 146 Ariz. 531, 533, 707 P.2d 329, 331 (Ct. App. 1985); *State v. Berry*, 133 Ariz. 264, 266, 650 P.2d 1246, 1248 (Ct. App. 1982); *State ex rel. Murphy v. Superior Ct. (Bracken)*, 12 Ariz. App. 338, 339, 470 P.2d 486, 487 (1970).

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The trial court entered judgment and sentence on November 3, 2011, and Defendant's attorney filed a Notice of Appeal and Designation of Record on November 15, 2011, which was within the 14-day period specified by Rule 4(a). That Notice of Appeal and Designation of Record listed, however, only Case No. JC 2009-177291 (the Becker case). It was not until November 29, 2011, that Defendant's attorney sent to the trial court a Notice of Appeal and Designation of Record listing both Case No. JC 2009-177291 (the Becker case) and Case No. JC 2009-177292 (the Sooman case). Because Defendant's attorney did not file with the trial court a notice of appeal for Case No. JC 2009-177292 (the Sooman case) within the 14-day period, it appears this Court does not have jurisdiction to review the proceedings in the Sooman case.

*B. Did the trial court abuse its discretion in denying Defendant's Motion To Dismiss.*

Defendant contends the State filed the charges in these matters beyond the 1-year statute of limitation and thus the trial court abuses its discretion in denying his Motion To Dismiss. The applicable statute provides in part as follows:

B. . . . [P]rosecutions for other offenses must be commenced within the following periods after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or the political subdivision that should have occurred with the exercise of reasonable diligence, whichever first occurs: . . .

2. For a misdemeanor, 1 year. . . .

C. For the purposes of subsection B of this section, a prosecution is commenced when an indictment, information or complaint is filed.

A.R.S. § 13-107(B)(2) & (C). In the present matter, the Arizona Registrar of Contractors learned of Defendant's potential offense on August 11, 2009, when the Soomans filed a complaint with the Registrar. The Registrar then sent the matter to the Maricopa County Attorney's Office, which filed charges on December 14, 2009. The State thus filed the charges within 1 year of the discovery of the potential offense. The filing of the charges was therefore timely, and thus the trial court did not abuse its discretion in denying Defendant's Motion To Dismiss.

Defendant contends, however, the state authorities should have known about any potential offenses between October 2007 and January 2008, and thus the filing of the charges was untimely. As noted by the State, the information sent to the Phoenix Development Services Department involved only the Sooman project and not the Becker project. Because the Phoenix Development Services Department knew nothing about the Becker project, the record shows the time did not start running in October 2007 or January 2008 for that project, and thus supports the trial court's denial of Defendant's Motion To Dismiss.

For the Sooman project, the record shows the Phoenix Development Services Department knew in October 2007 or January 2008 there were problems with that project, but that Department did not know of any allegation that Defendant was operating as a contractor. A review of the record shows the following time line:

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Nov. 25, 2006, Ray and Gloria Sooman entered into contract with Defendant.  
Nov. or Dec. 2006, Tom Frederick obtained building permit using his license.  
June 15, 2007, Tom Frederick sold business; his contractor's license was canceled.  
Oct. 2007, Ms. Mitchell began receiving preliminary lien notices for Sooman project.  
Oct. 2007, Ms. Mitchell notified Phoenix Devel. Serv. Dept. American Modular Service did not give anyone permission to use its license for Sooman project.  
Oct. 2007, Phoenix Devel. Serv. Dept. placed hold on building permit.  
Jan. 2008, Tom Frederick presented his new license to Phoenix Devel. Serv. Dept.; told them Defendant was not the contractor on the Sooman project.  
Jan. 2008, Phoenix Devel. Serv. Dept. took hold off building permit.  
June 2008, certificate of occupancy issued.

Defendant testified he, Tom Fredericks, and Ray Sooman spoke to personnel at the Phoenix Development Services Department, and testified as follows:

Q. Were the officials at the City of Phoenix aware that you were not the general contractor on the property?

A. Yes. The permit had been issued to American Modular Services and Tom Fredericks as the general contractor.

(R.T. of Jan. 20, 2011, at 120 ll. 11–15.) Because Defendant and Mr. Fredericks specifically told the personnel at the City of Phoenix Defendant was not acting as a contractor, the record supports the trial court's conclusion that, as of the period from October 2007 to January 2008, the State did not know, and had no reason to know, Defendant was acting as the general contractor for the Sooman project. The trial court therefore did not abuse its discretion in denying Defendant's Motion To Dismiss.

III. CONCLUSION.

Based on the foregoing, this Court concludes it dose not have jurisdiction in the appeal of the Sooman case (JC 2009–177292), and further concludes the trial court did not abuse its discretion in denying Defendant's Motion To Dismiss.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the North Valley Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the North Valley Justice Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT