

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,)	
)	CASE NO. ST-15-CR-210
Plaintiff,)	
vs.)	
)	
JEFFREY M. CUMMINGS,)	
)	
Defendant.)	
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MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Jeffrey M. Cummings’s Amended Motion to Dismiss.¹ During the Motions Hearing held on October 28, 2015, Cummings gave personal testimony and both parties offered oral argument on the Amended Motion to Dismiss. The Court denied Cummings’s motion by Order entered on December 16, 2015. This Memorandum Opinion expounds the Court’s reasoning for its earlier decision.

Background

Cummings is accused of embezzling more than \$30,146.25 from his former employer, Hooters restaurant in St. Thomas (“Hooters”),² and stealing a computer

¹ The record is a bit confused as to the chronology of filings. The Court received Cummings’s original Motion to Dismiss on September 29, 2015. Then, despite a certificate of service dated October 1, 2015, the Court did not receive a copy of the Amended Motion to Dismiss until October 28, 2015 – two days after it received the People’s Opposition to Amended Motion to Dismiss. Since the only difference the Court can discern between the two Motions concerns the addition of a proper signature line, and since the People have not objected to this irregularity, the Court will consider the Amended Motion as though it were filed before the Opposition.

² The alleged embezzlement consisted of Cummings’s not depositing money entrusted to him into Hooters’s bank account on or about March 21, March 28, and October 4, 2011, and his taking money from Hooters’s safe and video lottery machine on or about October 5-6, 2011.

from Hooters's owner, John Goard. Hooters recruited Cummings to serve as general manager in March 2011. Cummings moved to St. Thomas from his residence in Ocala, Florida, and he worked for Hooters from March 2011 through October 9, 2011. At that time, he terminated his employment, left St. Thomas on October 9, 2011 to return to Ocala, and remained there until his arrest in 2015. By no later than October 12, 2011, Hooters realized it was missing some of its money and reported the problem to the Virgin Islands Police. The Police obtained a warrant for Cummings's arrest on October 9, 2014, and, he was arrested in Florida on April 22, 2015. Cummings then voluntarily traveled to St. Thomas and surrendered to Virgin Islands Police on July 8, 2015 (and was subsequently released on bond). Cummings is charged with five counts of Embezzlement by Clerks, Agent, Employees, and one count of Grand Larceny.

Cummings moves to dismiss the Information under Super Ct. R. 128 and Fed. R. Crim. P. 12(b) (as incorporated by Super. Ct. R. 7) arguing that the three-year statute of limitations for embezzlement and grand larceny had expired; the crimes alleged in the Information were committed, at the very latest, on October 6, 2011, and the warrant for his arrest did not issue until October 9, 2014,³ more than three years later.

³ Cummings was not arrested in Florida until April 22, 2015, and the People did not file the Information until May 26, 2015. Which date constitutes the key event for the statute of limitations is not entirely clear. The text of Section 3541(b) itself suggests it is the information ("... the *information* may be filed within the term herein limited . . .") (emphasis added), but the District Court in its trial capacity held that the date of the warrant was determinative. *Government of the Virgin Islands v. Moncayo*, 31 V.I. 135, 142 (D.V.I. 1994). The Virgin Islands Supreme Court has

Analysis

The Virgin Islands Code requires the People to commence any criminal action for embezzlement or grand larceny within “three years after [the crime’s] commission”⁴ unless the three-year period had been tolled for some reason. V.I. Code Ann. tit. 5, § 3541.⁵ The People appear to concede that more than three years elapsed between the commission of the alleged crimes and the issuance of the arrest warrant (and the filing of the Information). Instead, the People rely on 1) the novel theory that the “discovery rule” applicable to some civil actions ought to apply to this criminal case and 2) the theory that Cummings was “fleeing from justice,” which, if true, would render the statute of limitations inapplicable. § 3541(c). Cummings’s Amended Motion anticipated the People’s Section 3541(c) argument and offered extensive

suggested the key date is the filing of the information (although it did so in apparent tension with *Moncayo*, its putative source). *Miller v. People of the Virgin Islands*, 54 V.I. 398, 402 (V.I. 2010).

⁴Embezzlement and grand larceny are felonies, V.I. Code Ann. tit. 14, §§ 2, 1083, 1093, 1094, distinct from “Embezzlement of Public Monies,” V.I. Code Ann. tit. 14, § 1662. The latter has no applicable limitation on its commencement. V.I. Code Ann. tit. 5, § 3541(a)(1).

⁵ Section 3541 reads in whole:

- (a) A criminal action shall be commenced within the following periods:
 - (1) For murder, felony child abuse, felony child neglect, any felony sexual offense perpetrated against a victim, embezzlement of public moneys, and the falsification of public records, there is no limitation of the time within which a prosecution shall be commenced.
 - (2) For any felony other than specified above, action shall be commenced with [sic] three years after its commission.
 - (3) For any misdemeanor, action shall be commenced within one year after its commission.
- (b) If the defendant is out of the Virgin Islands when the offense is committed, the information may be filed within the term herein limited after his coming within the Virgin Islands, and no time during which the defendant is not an inhabitant of, or usually resident within, the Virgin Islands is a part of the limitation.
- (c) Nothing in this section extends to persons fleeing from justice.

analysis of Federal Circuit Court interpretations of a similarly worded Federal statute.

Despite these briefings, the Court declines to rule on whether the civil discovery rule applies here or on whether Cummings was “fleeing from justice” under Section 3541(c) because the issue is more easily resolved through the application of the tolling provision in Section 3541(b), which reads in relevant part:

[N]o time during which [Cummings was] not an inhabitant of, or usually resident within, the Virgin Islands is a part of the [three-year] limitation.

In other words, the statute of limitations tolls if, and for as long as, a defendant moves out of the territory.^{6,7} According to the Amended Motion to Dismiss and Cummings’s testimony, Cummings left the Virgin Islands for good on or shortly after October 9, 2011, and returned to Ocala, Florida, where he had resided before taking the job at Hooters. There is no suggestion that he ever returned to the Virgin Islands prior to his arrest and surrender in 2015. Therefore, he has “not [been] an inhabitant of, or usually resident within, the Virgin Islands” since October 2011 and the statutory clock has been frozen since then.⁸ Since no more than seven months had

⁶ Subject, of course, to the requirements of the Due Process Clause, which has not been invoked here.

⁷ This is different than the flight from justice provision in Section 3541(c) since it is both possible to be out of the territory without fleeing from justice and to be fleeing from justice without leaving the territory.

⁸ Section 3541(b), which is based on the 1921 codes, was not drafted artfully. As a matter of pure syntax, it is possible to construe the Section such that the out-of-territory tolling is modified by the conditional phrase: “If the defendant is out of the Virgin Islands when the offense is committed” However, the Court does not adopt this construction because the hard comma and the “and” before “no time” suggest that the conditional phrase only modifies the clause that immediately follows it (i.e. “the information may be filed within the term herein limited after his coming within the Virgin Islands”) and not the rest of the subsection, which constitutes a complete, complementary thought,

elapsed between the time of the first alleged embezzlement in March 2011 and the time Cummings returned to Florida, the statutory clock had at least twenty nine remaining months frozen into it at the time of Cummings's arrest in Florida. Therefore, the statute of limitations does not bar Cummings's prosecution.

Conclusion

The Court holds that Cummings's time in Florida did not count against the three-year statute of limitation under V.I. Code Ann. tit. 5, § 3541(b). Therefore, his Amended Motion to Dismiss is denied.

Copies of this Memorandum Opinion shall be directed to Quincy McCrae, Assistant Attorney General, Vincent Fuller, Esq., and Robert Heyman, Esq.

DATED: May 9, 2016



Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: 
LORI BOYNES TYSON
Court Clerk Supervisor 5/9/16

as well as a complete sentence. *Moncayo* accords with this construction. 31 V.I. at 140. Moreover, a holding to the effect that the statute of limitations tolls when a defendant leaves the territory only if the defendant also began the statutory period outside the territory is too strange a policy preference for the Court to impute to the Legislature from this text alone.