

Judiciary

FEDERAL REGIONAL COURT OF THE 3rd REGION

CRIMINAL EXECUTION APPEAL No. 0004802-10.2017.4.03.6181/SP

2017.61.81.004802-5/SP

REPORTER: Federal Judge NINO TOLDO

APPELLANT: Public Prosecution

APPELLEE: EDVANALDO GUIMARAES PEREIRA

LAWYER: SP082769 PEDRO LUIZ CUNHA ALVES DE OLIVEIRA

and another

ORIGINAL NUMBER: 00048021020174036181 1P Vr SAO PAULO/SP

DISSENTING VOTE

THE HONORABLE FEDERAL JUDGE JOSÉ LUNARDELLI:

The case at hand, according to the report drafted by the Honorable Federal Judge Nino Toldo, to which I refer for descriptive purposes (pages 175), concerns a Criminal Execution Appeal filed by the Federal Public Ministry (MPF) against the decision of the 1st Federal Criminal Court of São Paulo/SP (pages 115/116v), which declared the extinguishment of the punishment of EDVANALDO GUIMARÃES PEREIRA due to the occurrence of the prescription of the enforcement claim, based on articles 107, W, 109, IV, 110, and 112, I, all of the Penal Code.

During a session held on July 25, 2019, I dissented from the rapporteur (certification on page 173) to deny the appeal of the Federal Public Ministry, for the reasons I will now explain:

Regarding the merit of the appeal, Article 112, I, of the Penal Code provides:

"Article 112 - In the case of Article 110 of this Code, the prescription begins to run:

I - from the day the convicting sentence becomes final for the prosecution, or the one that revokes the conditional suspension of the penalty or the conditional release;"

In accordance with the literal interpretation of the legal provision, for a long time, I decided that "the starting point of the enforcement prescription only begins from the day the convicting sentence becomes final for the prosecution, in the terms of Article 112, item I, of the Penal Code" (Appeal in Strict Sense No. 0816583-56.1981.4.03.6181/SP - D.E. 17/11/2011). In the same vein, for example, the decisions rendered in the records of the appeals in Penal Execution No. 0010612-10.2010.4.03.6181/SP and No. 0002397-7763588.V002 1/3 (e-STJ Fl.253)

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74.2012.403.6181/SP, both under my rapport, published in D.E. on 21.08.2012 and 07/03/2014, respectively.

Subsequently, I adopted the understanding of this Honorable Court, that the starting point for counting the prescriptive period of the enforcement claim occurred with the final judgment for both parties, and, in this line, the Honorable Fourth Section has been deciding until recently (e.g., EMBARGOS INFRINGENTES E DE NULIDADE No. 0006821-57.2015.4.03.6181/SP, Rel. Des. Fed. NINO TOLDO, D.E. 03/07/2018).

It is true that the issue remains controversial and has, in fact, been affected by the general repercussion regime since December 12, 2014 (ARE 848.107), still pending judgment.

However, upon reviewing the matter again, I am convinced of the correctness of the initial decisions I rendered, in the sense that the starting point for the commencement of the deadline for the exercise of the penal enforcement claim is the date of final judgment for the prosecution, as determined by the literal wording of the legal provision governing the subject (Article 112, I, of the Penal Code).

Furthermore, even if the literal interpretation were not sufficient to resolve the controversy, it is certain that one cannot ignore that, in the penal realm, the solution of apparent conflicts between norms is imposed in favor of the defendant, not to his detriment.

In this sense, the jurisprudence of the Superior Court of Justice has consistently decided that the deadline for exercising the penal enforcement claim begins with the final judgment for the prosecution, applying the provisions of Article 112, I, of the Code of Criminal Procedure, literally, in favor of the convict: STJ, THIRD SECTION, EDcl in EMBARGOS DE DIVERGÊNCIA EM AGRAVO EM RECURSO ESPECIAL No. 556.384/SP, RELATOR: MINISTER REYNALDO SOARES DA FONSECA, DJe: 07/05/2018; THIRD SECTION, AgRg in EDcl in EDv in AgRg in EDcl in EAREsp 770.540/DF, Rel. Minister JOEL ILAN PACIORNIK, DJe 27/06/2017; 5th Turma, HC 452784 / SP, Rapporteur Minister FELIX FISCHER, DJe 21/08/2018; C Turma, AgRg in REsp 1687985 / SP, Rapporteur Minister SEBASTIÃO REIS JÚNIOR, DJe 02/08/2018.

It can be seen, therefore, that the appealed decision is perfectly aligned with the literal interpretation of the provision of Article 112 of the Penal Code (more favorable to the convict) and with the prevailing orientation of the STJ.

DECISION

Based on the foregoing, I deny the appeal of the Federal Public Ministry.

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"Document electronically signed digitally by the Federal Judge JOSÉ LLINARDELLI, in accordance with art. 1º, §2º, III, "a" of Law No. 11.419 of 19/12/2006 combined with Provisional Measure No. 2,200-2/2001 of 24/08/2001, which instituted the Brazilian Public Key Infrastructure - ICP-Brasil. The authenticity of the document can be verified on the website

<http://web.trf3.jus.br/acordaosNerificacaoAssinatura> by informing the verification code 7763588v2., except in cases of documents under judicial secrecy."

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CLARIFICATION OF DOUBTS IN CRIMINAL EXECUTION APPEAL

No. 0004802-10.2017.4.03.6181/SP

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REPORTER: Federal