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**IN THE  
COURT OF APPEALS OF INDIANA**

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TIMOTHY KOPKEY, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 66A03-0606-CR-241  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE PULASKI CIRCUIT COURT  
The Honorable Michael A. Shurn, Judge  
Cause No. 66C01-0410-FB-8

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**March 27, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Timothy Kopkey (“Kopkey”) was convicted by a jury in Pulaski Circuit Court of Class B felony child molesting and sentenced to nineteen years. He appeals, raising two issues:

- I. Whether his conviction is barred by the statute of limitations; and,
- II. Whether he received ineffective assistance of counsel.

Concluding the applicable statute of limitations bars Kopkey’s conviction, we reverse.

### **Facts and Procedural History**

On October 25, 2004, the State charged Kopkey with Class B felony child molesting, two counts of Class C felony child molesting, and Class D felony child molesting. The State alleged that Kopkey had molested his niece L.A. multiple times between July 26, 1983 and June 21, 1991.

On March 13, 2006, the first day of jury trial, the State dismissed all but the Class B felony child molesting charge, which alleged that Kopkey had molested L.A. from July 26, 1983 through June 20, 1988, when she was ages seven through eleven. The jury convicted Kopkey of Class B felony child molesting, and he was sentenced to nineteen years. Kopkey now appeals.

### **Discussion and Decision**

Kopkey contends that the statute of limitations barred the State from prosecuting him for Class B felony child molesting because the acts were alleged to have occurred between July 26, 1983 and June 20, 1988. Kopkey was not charged until October 2004, more than five years after the alleged acts.

Kopkey points out that on June 20, 1988, the last date he was charged with molesting L.A., the statute of limitations provided that a prosecution for a Class B felony must be commenced within five years after the commission of the crime. See Ind. Code § 35-41-4-2 (1988). In 1993, our general assembly amended the statute of limitations statute to permit commencement of a prosecution for child molesting until the date the alleged victim reaches thirty-one years of age. See Ind. Code § 35-41-4-2(e) (2004 & Supp. 2006). However, that amendment applies only to crimes committed after June 30, 1988. See P.L. 232-1993, Sec. 4.<sup>1</sup>

The State charged Kopkey with molesting L.A., at the latest, on June 20, 1988. Under the five-year statute of limitations in effect at that time, Kopkey was immune from prosecution for those acts on June 20, 1993, ten days before the effective date of the amendment extending the statute of limitations for child molesting prosecutions. See Stogner v. California, 539 U.S. 607, 615 (“a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict”).

In response, the State contends that by failing to raise his statute of limitations defense at trial, Kopkey has waived it, and urges us to adopt the reasoning of Justice Boehm’s dissent in Wallace v. State, 753 N.E.2d 568, 571 (Ind. 2001) (Boehm and Dickson, JJ., dissenting). Compelling though that reasoning may be, we are constrained to follow the majority opinion of our supreme court in Wallace, holding that a statute of limitations defense is not waivable. See id. at 569-70.

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<sup>1</sup> This restriction prevents the amended statute of limitation from applying to offenses for which the limitation period had already run, thereby avoiding violation of the prohibition of ex post facto laws. Minton v. State, 802 N.E.2d 929, 934 (Ind. Ct. App. 2004).

The State's prosecution of Kopkey for Class B felony child molesting allegedly occurring at the latest on June 20, 1988 was barred by the applicable statute of limitations.<sup>2</sup> Therefore, his conviction must be reversed. As such, we need not address Kopkey's contention that he received ineffective assistance of counsel.

Reversed.

NAJAM, J., and MAY, J., concur.

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<sup>2</sup> The acts charged in dismissed Counts III and IV allegedly occurred between June 21, 1988 and June 21, 1991. Tr. p. 8. Molestations alleged to have occurred after June 30, 1988 would be subject to the extended statute of limitations.