O/A 5-10-84

IN THE SUPREME COURT OF FLORIDA

JAMES GUY FERRIS,

Petitioner,

vs. CASE NO. 63,588

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court below and the Appellant in the District Court of Appeal. The State of Florida was the prosecuting authority in the court below and the Appellee in the District Court of Appeal.

Citations to the record on appeal will be made by use of the symbol "R," followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as related in the First District's opinion, Ferris v. State, 428 So.2d 743 (Fla. 1st DCA 1983), with the following additions and clarifications. At the January 28, 1982, hearing on Petitioner's motion for discharge, the prosecutor pointed out that it was his understanding that the court's earlier ruling had been made for the purpose of taking the case outside the speedy trial rule and placing it within a reasonable time (R 198). Specifically, the prosecutor argued "that once the extension was granted for good cause, that there's no requirement that the specific period of time be mentioned or abided by, insofar as how far down the extension goes or how far off in the future the case should be set. It is to be within a reasonable period of time." (R 198) He also argued that concerning Petitioner's constitutional right to a speedy trial, that absolutely no prejudice had been shown (R 199). Defense counsel countered with an argument that Petitioner had shown prejudice merely by the fact that his client had been in jail (R 201). No mention was made about how Petitioner's being in jail hindered the preparation of his defense. The trial court apparently agreed with the prosecutor that the State's motion for continuance had taken the case outside the speedy trial rule, and he denied the motion for discharge (R 202). In that regard, it should be pointed out that the State's motion for continuance was based in part upon Petitioner's co-defendant's inability to go to trial because of a pending

motion concerning insanity. See Fla.R.Crim.P. 3.191(d)(3)(ii). Thus, that portion of the continuance should be attributed to Petitioner rather than the State.

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION FOR DISCHARGE.

Although this case purportedly involves only the issue of whether the trial court correctly denied Petitioner's motion for discharge, for clarity, the State will divide the argument into sub parts.

A. CERTIORARI WAS IMPROVIDENTLY GRANTED BECAUSE THERE IS NO EXPRESS AND DIRECT CONFLICT WITH NEUMAN V. STATE, 431 So.2d 168 (Fla. 5th DCA 1983).

In Neuman, supra, the Fifth District Court of Appeal was faced with a situation where the trial court had denied a defendant's motion for discharge made after the trial court had orally "reset the trial in about 30 to 45 days." Id. at 431 So.2d 169. The Fifth District surmised that the reason for resetting the trial was to provide the defendant's co-defendant's lawyer time to prepare for trial. The Fifth District recognized that this could be construed as an exceptional circumstance under Fla.R.Crim.P. 3.191(d)(2)(ii) and 3.191(f)(5). However, the Fifth District did not treat the resetting of trial as a continuance charged to the defense because no written order had ever been entered. Id.

Petitioner's case presents a different situation. Although defense counsel at trial argued that the case had been orally set to a date certain, the trial court found that by granting

the State's motion for continuance (which alleged an exceptional circumstance chargeable to the defense), the case had been taken outside the strict time limits of the speedy trial rule and placed within the reasonable time provided under the law of constitutional speedy trial. Thus, the former case involves speedy trial set to a date certain while the latter case involves speedy trial taken outside the rule and placed within the constitutional speedy trial parameters. In other words, there is no express and direct conflict sufficient for this Court to exercise its conflict jurisdiction.

The State recognizes that there is dicta in Neuman which specifically disagrees with the First District's prior opinion of State ex rel Lee v. Harper, 372 So.2d 1012 (Fla. 1st DCA 1979). In that case, the First District held that when a continuance is granted to the State for an exceptional circumstance, the matter is taken outside the speedy trial rule regardless of whether the order granting the continuance extended speedy trial for a reasonable time or until a date certain. In Harper, the trial court had reset the trial date to a date certain even though the date was outside the time limits of the rule. Therefore, if there is any conflict, it is between Neuman (upon which the State did not seek review) and Harper rather than between Neuman and Petitioner's case. Accordingly, the State submits that certiorari was improvidently granted and that the case should be dismissed.

B. THE STATE'S PROPERLY GRANTED MOTION FOR A CONTINUANCE TOOK THE CASE OUTSIDE THE TIME LIMITS OF THE SPEEDY TRIAL RULE.

There has been no allegation in any court that the trial court abused its discretion when it granted the State's motion for continuance. Nor could there be in light of the fact that the reasons expressed in the State's motion (the unavailability of a key witness and Petitioner's co-defendant's unpreparedness for trial) are factors specifically mentioned in Rule 3.191(d)(3) and 3.191(f)(1).

Respondent's argument can be simply stated--once the State is granted a continuance, the strict speedy trial limits of the rule are replaced with a reasonable time under the constitution. This statement of law is neither new nor controversial. For example, in Jacobs v. State, 396 So.2d 1113, 1116 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981), the State successfully appealed the trial court's pre-trial order granting the defendant's motion to suppress. The State sought and obtained several extensions--the State initially was granted a continuance to take an interlocutory appeal, and the successive motions for extensions of time included one which extended the time "for a reasonable period of time after the appellate court filed its opinion ...." Id. On appeal, the defendant argued that the subsequent "reasonable" extensions were ineffective as a matter of law because the trial court had lost jurisdiction after the original extension which allegedly was limited to 60 days. This Court rejected that argument, however, and found

that the original extension, like the First District found in Petitioner's case, was for a reasonable period of time. Id. The Court quoted from State ex rel Butler v. Cullen, 253 So.2d 861 (Fla. 1971), which involved a defense continuance, and the Court then noted that the rule was "equally applicable when the state seeks a continuance. See King v. State, 303 So.2d 389 (Fla. 3d DCA 1974)." Id.

The same rationale, i.e., the State's properly granted motion for a continuance taking the matter outside the limits of the speedy trial rule, can be found in this Court's opinion in Butterworth v. Fluellen, 389 So.2d 968 (Fla. 1980). In that case, this Court framed the issue as "whether a continuance by the state starts a new ninety-day time period within which the defendant must be brought to trial in accordance with the existing Rule of Criminal Procedure 3.191(d)(3) ...." Id. at 389 So.2d 969. The Court specifically held that a new speedy trial time period did not begin and that the ninety day provision of the rule was not "applicable whenever the State seeks a continuance." Id. It is significant that the Court receded from any implication to the contrary in Negron v. State, 306 So.2d 104 (Fla. 1974). However, even more significant is the fact that this Court specifically disapproved of the lower courts' decisions in Johnson v. State, 366 So.2d 525 (Fla. 3d DCA 1979), and State v. Reese, 359 So.2d 33 (Fla. 4th DCA), cert. denied, 365 So.2d 715 (Fla. 1978), which had both held that a defendant must be tried within ninety days after the granting of the State's continuance. See Butterworth v. Fluellen, supra at 389 So.2d 970.

Should there be any doubt that this Court has already conclusively resolved this issue in favor of the State and contrary to the arguments advanced by Petitioner, the Court has only to look at its per curiam opinion in Bufford v. State, 401 So.2d 1321 (Fla. 1981). In that case, the Court explained that it was discharging a petition for review because the issue upon which jurisdiction had been accepted had been resolved in Butterworth v. Fluellen, supra. When the Fifth District's opinion in State v. Bufford, 383 So.2d 928, 930 (Fla. 5th DCA 1980), is examined, it reveals that the Fifth District held "that the state's properly granted motion for continuance takes the matter out of the operation of the Speedy Trial Rule." The Fifth District concluded its opinion by stating that its decision was "in direct conflict with State v. Reese, 359 So.2d 33 (Fla. 4th DCA 1978)." Id. Therefore, in Bufford v. State, this Court has conclusively repudiated Reese and adopted the Fifth District's holding in State v. Bufford which is consistent with the First District's opinion under review now. While the Fifth District has purported to recede from its holding in Bufford, see State v. McDonald, 425 So.2d 1380 (Fla. 5th DCA 1983), the State submits that this recession was improper in light of this Court's per curiam opinion in Bufford v. State, supra. See Strickland v. State, 437 So.2d 150, 152 (Fla. 1983), and Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

In addition to the cases previously cited, numerous other appellate opinions hold that when the State is properly granted

a continuance, the time limits prescribed by the speedy trial rule are replaced with a reasonable time under the Constitutions of the State of Florida and the United States. See, e.g., State v. Kurtz, 354 So.2d 890, 892 (Fla. 4th DCA), cert. denied, 360 So.2d 1249 (Fla. 1978), in which the Fourth District held that "the state's proper Motion for Continuance, which was granted, also took this matter out of the strict operation of the Speedy Trial Rule." See also State v. Varga, 416 So.2d 1172 (Fla. 4th DCA 1982); Carr v. Miner, 375 So.2d 64 (Fla. 1st DCA 1979) (Booth, J., specially concurring).

In addition to the fact that the case law from this Court compelled the result reached by the First District in Petitioner's case, logic also supports the lower court's decision. If Petitioner were correct, then a defendant could always control the trial court's discretion by never asking for a continuance, and the State would always be forced to bring a defendant to trial within the time limits of the speedy trial rule regardless of whether an exceptional circumstance existed. Surely, this was not the intent behind the rule. Should Petitioner argue that the trial court would still be able to extend speedy trial until a date certain, what would happen if another exceptional circumstance occurred or the same one lasted longer than had been originally anticipated? Defendants would surely come into court and allege that the original speedy trial extension had expired and that the trial court was without jurisdiction--however, as has been argued previously, this was the precise argument wisely rejected by this Court in Jacobs, supra.

This Court has regularly and repeatedly held that the decision whether to grant a continuance is left to the sound discretion of the trial courts of this state. Implicit in the rationale behind this Court's reasoning is the recognition and understanding that the various trial courts are in the best position to protect a defendant's speedy trial rights under the rule by evaluating the State's reasons for a continuance. Of course, a defendant would always be entitled to a speedy trial under the Constitutions. Therefore, by holding that a continuance properly granted to the State automatically takes the case outside the strict time limits of the speedy trial rule, the court would not be eliminating any rights guaranteed defendants under the Constitutions. Moreover, such a holding would certainly clear up the confusion among the lower courts which have attempted to grapple with the numerous opinions on the speedy trial rule--a situation complicated even more by the fact that the rule has been amended several times.

In summary, the Court has previously recognized that the State's properly granted continuance takes the matter outside the time limits of the speedy trial rule and places the case within the parameters of the Constitution. Butterworth v. Fluellen, supra; Jacobs, supra; Bufford v. State, supra. There are sound policy reasons for such a rule, and Petitioner has shown no reason for this Court to recede from its prior statements of the law. Any decision to the contrary would, in effect, allow a defendant to control the exercise of the trial court's

discretion, and the State submits that such a result is neither wise nor required under the rule as it exists now.

Petitioner's reliance on State v. Jenkins, 389 So.2d 971 (Fla. 1980), is misplaced. In that case, the Court noted that the State's interlocutory appeal could effect the speedy trial time period under the rule in several ways depending on the trial court's order. The Court noted that when in a situation like Petitioner's case, i.e., when the Court extends speedy trial for the period of the appeal plus a reasonable period, the time limits of the rule are no longer in effect. Id. 389 So.2d 974. However, Petitioner has relied upon Jenkins for the other part of the Court's holding which was that if the time is extended for a time certain, the defendant must be tried within that time. But as has already been shown, the order in Petitioner's case was for a reasonable time and not for a date certain.

C. PETITIONER WAS TRIED WITHIN A REASONABLE TIME UNDER THE CONSTITUTIONS.

Petitioner has also argued in the alternative that if the Court agrees with the First District that there was no violation of the speedy trial rule because the strict time limits of the rule were inapplicable after the State's continuance had been granted, the trial court's order should be reversed anyway because of a violation of constitutional speedy trial. However, this argument is patently without merit. This Court has previously clearly stated that before a constitutional speedy trial violation can be found, the factors of Barker v. Wingo, 407 U.S. 514,

92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), must be considered and made applicable to the facts of an individual case. See State v. Department of Health & Rehabilitative Services v. Golden, 350 So.2d 344, 347 (Fla. 1976), which clearly requires a showing of prejudice. The only prejudice alleged in Petitioner's case was his lawyer's contention that his client had been prejudiced by having to stay in jail (R 201, 202). There was not even a scintilla of evidence offered that Petitioner had been prejudiced in the preparation of his defense, and the State has found no case which even remotely finds a constitutional violation under similar facts where no prejudice has been alleged. See, e.g., Howell v. State, 418 So.2d 1164, 1174 (Fla. 1st DCA 1982), and State v. Wallace, 401 So.2d 863, 864 (Fla. 1st DCA 1981), which both require that the prejudice must materially affect the defense and that the effect must be more than minimal. There has not even been an allegation of any effect at all in Petitioner's case. This portion of Petitioner's argument is without merit.

CONCLUSION

The State submits that certiorari was improvidently granted because there is no express and direct conflict between the First District's opinion and Neuman, supra. Should the Court disagree, the State contends that this Court has already held on at least several occasions that the State's properly granted motion for continuance takes the matter outside the speedy trial rule when the trial court's order of extension does not mention a date certain or time certain as the trial court's order did not do in this case. The State further contends that both logic and public policy would support the Court's clear statement that once a continuance has been properly granted to the State, a defendant must be tried within the constitutional parameters rather than the time limits of the speedy trial rule, regardless of whether a specific time is mentioned in the extension order. To hold otherwise would permit a defendant to control the trial court's exercise of discretion by making a speedy trial extension available only one time and for a period of only ninety days regardless of whether a second exceptional circumstance occurs or whether the original exceptional circumstance continues longer than expected. Both the State and Federal Constitutions are always available to protect a defendant's speedy trial rights, and there is no reason to interpret the rule in a way which would handcuff the exercise of discretion by the various trial courts of this state. The decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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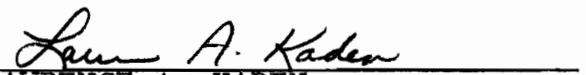
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Terry P. Lewis, Special Assistant Public Defender, Post Office Box 10508, Tallahassee, Florida, 32302, on this 14th day of March, 1984.



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