

IN THE SUPREME COURT OF FLORIDA

CASE NO. 62, 396

THE STATE OF FLORIDA,

Petitioner,

vs.

V.V., a juvenile,

Respondent.

FILED
SID J. WHITE
NOV 15 1965
CLERK, SUPREME COURT
By [Signature]
Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The State of Florida was the petitioner in the juvenile court. The respondent, V.V., a juvenile, was the defendant in the criminal division and the respondent in the juvenile division of the trial court. The parties will be referred to in this brief respectively as the State and the defendant.

References to the record on appeal will be indicated by "R" followed by the page number.

STATEMENT OF THE FACTS AND CASE

The defendant was charged by information dated July 27, 1982, with robbery. (R-1) The alleged offense took place on December 22, 1981, and defendant was booked on June 9, 1982. (R-1)

On September 13, 1982, the date set for trial, defendant moved for a transfer from the (adult) Criminal Division of the Circuit Court to the Juvenile Division, on the ground that he was 15 on the date of the alleged offense although he was

concededly 16 when the charges were brought. (R-9).

Judge **Morphonios** granted the motion, tolling speedies from July 13, the date the State announced it would direct file the charges, to September 14, the date of her order of transfer. (R-9)

A petition of delinquency was filed September 23, alleging the same criminal act. (R-2)

On November 8, defense counsel moved for discharge for failure to file the petition within 45 days of the day the child was taken into custody (R-4), and for dismissal on the ground that over 90 days had expired since the defendant had been taken into custody. (R-5)

On January 10, 1983, defendant filed a Motion For Discharge Under The 45-Day Rule and Speedy Trial Rule (Supplemental) (R-9-10)

Defendant was not detained at any time (R-3,6), and at least two continuances were granted to the defense in juvenile court. (R-7,8)

On January 10 a hearing on the aforesaid defense motions was held in juvenile court and the motion for discharge was granted. This appeal followed.

ISSUE ON APPEAL

WHETHER THE 45-DAY SPEEDY FILING
RULE OF FLORIDA STATUTE 39.05(6)
IS WAIVED BY JUVENILE CHARGED BY
INFORMATION WHO DOES NOT MOVE FOR
TRANSFER TO JUVENILE COURT UNTIL
AFTER THE 45-DAY PERIOD HAS RUN.

SUMMARY OF ARGUMENT

The 45-day speedy filing requirement of Florida Statute 39.05(6) is waived by a juvenile who, charged by direct information, does not move for transfer to juvenile court until after the 45-day period has run. Just as the speedy trial rule may be waived, so may the 45-day rule. The 45-day rule does not apply where a juvenile is not detained.

ARGUMENT

THE 45-DAY SPEEDY FILING RULE OF
FLORIDA STATUTE 39.05(6) IS WAIVED
BY JUVENILE CHARGED BY INFORMATION
WHO DOES NOT MOVE FOR TRANSFER TO
JUVENILE COURT UNTIL AFTER THE 45-DAY
PERIOD HAS RUN.

The defendant is not entitled to dismissal for failure to comply with the 45-day filing rule of §39.05(6), Florida Statutes.

In the first place, where the defendant is not in custody the 45-day "speedy filing" rule of Florida Statute §39.05(6) does not apply. Controlling in this case is the logic of State v. C.B. wherein the Fourth District Court of Appeal held that the rule does not apply where the accused was not "actually detained rather than being released," at 920. In the case sub judice the defendant was charged but never detained. In reversing the dismissal of petitions filed between 50 and 52 days from the date juveniles were taken into custody and released, the court in State v. C.B interpreted the legislature's intent as limiting filing time only where the defendants were actually detained.

Secondly, the defendant at bar is estopped from claiming the benefit of the "speedy filing" requirement where he did not move to bring himself within its boundaries until the deadline had passed.

Like the speedy trial rule (Florida Statute §39.05(7) and §39.09(1) (a)), the 45-day rule may be waived. Here, the defendant did not move for transfer until after the expiration of not only the 45-day period but also the 90-day juvenile speedy trial time. While he was free to move to transfer at any time prior to his trial as an adult, as the Third District Court of Appeal held in Parker v. State, 410 So.2d 215 (Fla. 3d DCA 1982), by his delay he waived the benefit of the "speedy filing" rule, which is not available to adult defendants.

In order to take advantage of the more favorable treatment he could anticipate in juvenile court, a defendant charged as an adult must move for a transfer. §39.04(e)(4) Fla. Stat., Parker v. State, supra. The cases make clear that the speedy trial time is tolled during the interval that the case is in adult court. D.C.W. v. State, 445 So.2d 333 (Fla. 1984), W.M. v. Tye, 377 So.2d 225 (Fla. 4th DCA 1979). It follows that the defendant who moves to transfer to juvenile also waives his right to the 45-day filing rule.

Moreover, the analysis in W.M. v. Tye, supra, exactly applies to this cause:

"If the petitioner's contention was upheld after the case was transferred to the Circuit Court pursuant to Section 39.04(2)(e)(4), [defendant] could wait until the 90-day period had nearly expired and then have the case transferred back to Juvenile Court and there would then be inadequate time under the 90-day rule for the State to bring [him] to trial. Surely that sort of procedural game playing was not contemplated by the Legislature," at 226.

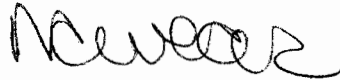
The order of dismissal must be reversed and the cause reinstated.

CONCLUSION

Respondent, charged by direct information and not detained, who did not move for transfer to juvenile court until after the 45-day speedy filing period ran, waived that requirement. Dismissal of the petition filed after the motion for transfer was granted must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to BETH WEITZNER, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125 on this 13th day of November, 1985.



NANCY C. WEAR
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NCW/gp