

W. O. O. A.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,403

THE STATE OF FLORIDA,

FILED

SID J. WHITE

Petitioner,

NOV 7 1985

vs.

CLERK, SUPREME COURT

By: [Signature]
Chief Deputy Clerk

J.B., a juvenile,

Respondent,

BRIEF ON MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Petitioner, the State of Florida was the Appellant in the Third District Court of Appeal and the prosecution in the trial court. The Respondent J.B., was the Appellee in the District Court and the defendant in the trial court. The parties will be referred to as they stand before this Court. The symbol "R" will designate the record on appeal and the symbol "A" will designate the appendix to this brief which includes the transcript of October 28, 1982. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On September 1, 1982, a petition for delinquency was filed charging the Respondent with robbery and battery (R. 1). On said date a plea of denial was entered and hearing was set for September 20, 1982 (R. 3-3A).

Thereafter, the Respondent motion to compel Officer Baker to appear at deposition was filed and granted on September 29, 1982. (R. 2) On September 30, 1982, Respondent filed a Motion for Order to Show Cause why Officer should not be held in contempt for failing to appear at her deposition. (R. 6-7).

On September 30, 1982 this cause came before the trial court (R. 13-17). The State sought a continuance since the victim had not yet arrived at court. Respondent moved for a dismissal based on lack of prosecution. The continuance was granted and the motion to dismiss denied. Respondent then moved for a Show Cause Order concerning Officer Baker's failure to appear at deposition. Upon learning that Officer Baker also wasn't present, the trial court reversed itself and denied the continuance and granted the motion to dismiss based on lack of prosecution. (R. 8, 14-16). After a recess, the State advised that the victim had been in court earlier that day, but was misplaced and sought to set aside the dismissal. Respondent argued that the dismissal was based on both lack of prosecution and the failure of a State's witness to appear for deposition. Based on the latter ground the trial court denied the motion to set aside the dismissal (R. 16-17).

On October 1, 1982, the State refiled a petition for delinquency (R. 8A). On October 15, 1982 a plea of denial was entered (R. 18-18A). Respondent on October 28, 1982, filed a motion to dismiss, claiming that the case had previously been dismissed with prejudice based on the failure of a State witness to appear for deposition (R. 19). At the hearing thereon the State argued that the case was dismissed for lack of prosecution and since the petition was refiled within 45 days after arrest, it was not subject to dismissal

(A. 2-3). Respondent argued the dismissal was with prejudice as a sanction against the State for failing to produce a witness for deposition (A. 3). The trial court granted the motion to dismiss citing as authority Balikes v. Speleos, 173 So.2d 731 (Fla. 3d DCA 1965). (A. 5, R. 30).

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS THE REFILED PETITION FOR DELINQUENCY WHERE THE DISMISSAL, WHETHER BASED UPON A SANCTION AGAINST THE STATE FOR FAILURE OF A WITNESS TO APPEAR FOR DEPOSITION OR FOR LACK OF PROSECUTION, DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW.

SUMMARY OF THE ARGUMENT

The trial court erred in granting the Motion to Dismiss as a sanction for the failure of a States witness to appear for deposition. The court also erred in dismissing on the ground of lack of prosecution since the refiled Petition was filed within the speedy trial time limits.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS THE REFILED PETITION FOR DELINQUENCY WHERE THE DISMISSAL, WHETHER BASED UPON A SANCTION AGAINST THE STATE FOR FAILURE OF A WITNESS TO APPEAR FOR DEPOSITION OR FOR LACK OF PROSECUTION, DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW.

The trial court granted the motion to dismiss the refiled Petition on the ground that the first dismissal was with prejudice as a sanction against the State for failure of Officer Baker to appear at deposition. The State submits that said dismissal was a departure from the essential requirements of law and requires reversal.

It is well established that it is not the responsibility of the prosecution to produce State's witnesses for depositions. State v. Valdes, 443 So.2d 302 (Fla. 3d DCA 1983); Turiano v. Butterworth, 416 So.2d 1261 (Fla. 4th DCA 1982); State v. Adderly, 411 So.2d 981 (Fla. 3d DCA 1982); State v. Banks, 349 So.2d 736 (Fla. 3d DCA 1977); State v. Roig, 305 So.2d 836 (Fla. 3d DCA 1974). Furthermore "[t]o order the State to do so, or to dismiss a criminal case for failure of the State to do so, constitutes a departure from the essential requirements of law." State ex. rel. Gerstein v. Durant, 348 So.2d 405, 408 (Fla. 3d DCA 1977).

Therefore it is clear that the trial court departed from the essential requirements of law when the case was dismissed with prejudice as a sanction against the State for its failure to produce a witness for deposition. The trial court reliance on Balikes v. Spellos, supra was misplaced since the holding thereon permits dismissal with prejudice only if it is shown that Respondent was deprived of a constitutional right by the State. See State v. Fattorusso, 228 So.2d 630 (Fla. 3d DCA 1969). What the trial court should have done in this instance is grant a continuance chargeable to the State and allow the cause to proceed. If the witness never appeared or appeared late, then another continuance could have been charged to the State and trial set outside the speedy trial limits and then discharge the Respondent based on speedy trial violation. The Court could also have excluded the witnesses from testifying and put the State justifiably, in a precarious position. See State ex rel. Gerstein v. Durant, supra. Since the trial court did not follow the proper procedure and applied the wrong law to the facts, its action departed from the essential requirements of law and mandates reversal. Jones v. State, 10 F.L.W. 565 (Fla. October 17, 1985) Boyd , C.J. concerning specially.

Assuming arguendo that the dismissal was for lack of prosecution, the State submits the dismissal still departed from the essential requirements of law. At the time refiling

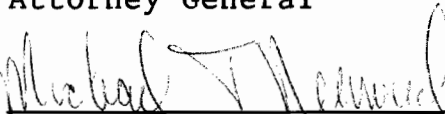
of the Petition speedy trial had not yet run therefore re-filing was permissible. If the trial court was dissatisfied with the States performance at the time of the dismissal of the original petition, the court could have denied the continuance and forced the State to trial or to nol-pros the case. Therefore, dismissal was unwarranted. State v. Evens, 415 So.2d 459 (Fla. 4th DCA 1982); State v. Lowe, 398 So.2d 962 (Fla. 4th DCA 1981).

CONCLUSION

Based upon the foregoing points and citations of authority, the State respectfully submits the Order of the Third District Court of Appeal refusing to treat the instant appeal as a petition for writ of certiorari should be quashed and the cause remanded to the Third District for consideration on the merits.

Respectfully submitted,

JIM SMITH
Attorney General



MICHAEL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF ON THE MERITS** was furnished by mail to **BRUCE A. ROSENTHAL**, Attorney for Respondent, 1351 N.W. 12th Street, Miami, Florida 33125 on this 5 day of November, 1985.



MICHAEL J. NEIMAND
Assistant Attorney General

MJN/dm