01A 9-5-84

IN THE SUPREME COURT OF FLORIDA

RONALD EDWARD HILL,

Petitioner,

v. CASE NO. 64,493

STATE OF FLORIDA,

Respondent.

BRIEF ON MERITS

JIM SMITH
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STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by Petitioner with the following addition. The case in the court below is reported as Hill v. State, 438 So.2d 971 (Fla. 2d DCA 1983).

ARGUMENT

ISSUE

PETITIONER WAS ENTITLED TO DISCHARGE WHERE THE STATE FAILED TO HOLD TRIAL WITHIN THE 180 DAY TIME LIMIT OF THE SPEEDY TRIAL RULE AFTER PETITIONER'S COURT-APPOINTED COUNSEL WITHDREW AT THE PRETRIAL CONFERENCE, NEW COUNSEL WAS APPOINTED, THE CASE WAS RE-DOCKETED FOR A LATER DATE, PETITIONER NEVER REQUESTED A CONTINUANCE, AND THE COURT NEVER ORDERED AN EXTENSION OF THE SPEEDY TRIAL PERIOD.
(As stated by petitioner)

Petitioner asks this court to adopt a rule of law which negates a continuance as a basis of waiving the 180-day speedy trial rule.

Petitioner overlooks the underpinnings of the Second District's decision. As in agency, authority can be actual, express, apparent, or implied. Here, as a consequence of the 11th hour withdrawal of counsel (Hill v. State, 438 So.2d 971, 972 fn 3), the appellate court found a resultant continuance.

One wonders of defense counsel propriety when waiting so long to announce to the trial court the basis of the conflict created by his six (6) clients' differing degrees of involvement in the escape and diverse defense strategies. This court in Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) addressed the ethical and constitutional responsibilities of counsel when a conflict-of-interest arises:

> [1-4] Conflict-of-interest cases usually arise at the trial level, but, being caused by one attorney representing two or more clients, can arise at any level of the judicial process. In general an

> attorney has an ethical obligation to avoid conflicts of interest and should advise the court when one arises. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). An actual conflict of interest that adversely affects a lawyer's performance violates the sixth amendment and cannot be harmless error. Id; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Foster v. State, 387 So.2d 344 (Fla. 1980).
>
> Counsel's allegiance to a client must remain unaffected by competing obligations to other clients, and an actual conflict of interest renders judicial proceedings fundamentally unfair. United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978). A conflict occurs "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975).
>
> (text of 444 So.2d at 958)

This court found counsel to have a conflict of interest because effective representation would have pitted one client against another. Against this background, Assistant Public Defender Robert Antonello had no choice but to withdraw as counsel. Support is found in this record that the attorney Antonello withdrew one week before Petitioner's trial. Hill v. State, supra at 972, fn 3.

How to categorize the continuance identified by the Second District does not escape Respondent. The continuance is resultant and/or one created by operation of law. In general, the law of agency is based on the Latin maxim qui facit per alium, facit per se ["one acting by another is acting for himself"]. Here, what extent of control did Petitioner exercise over the details of the Public Defender's

representation and/or is it to be presumed that counsel attended to his representation without client supervision? If a conflict-of-interest surfaces, it is not beyond the ordinary and usual course of legal representation for counsel to withdraw from the case. The collateral consequences of counsel withdrawal, here a resultant continuance, is not beyond the ordinary and usual course of representation when a conflict-of-interest demands resolution.

The Second District has found it desirable to find a continuance in the absence of a formal announcement. By analogy, suppose a wife purchases certain necessities and charges them to her spouse's account. If the wife is not a party to credit agreement, courts often rule that the husband is liable for payment because of the social policy of promoting family welfare. Here a continuance by operation of law is created. Mr. Antonello had emergency power to act under the changed circumstances where a conflict-of-interest surfaced. Failure to withdraw from the case would have worked a hardship on Petitioner. The trial court, in essence, granted this emergency power; and, the Second District has affirmed it.

The decision of the Second District prevents a miscarriage of justice. Petitioner's claim is predicated on strict compliance with Fla. R. Crim. P. 3.191(d)(3)(ii). Here there was no violation of the substantive right to a speedy trial guranteed by the 6th Amendment to the United States Constitu-

tion and Article I, Section 16, Florida Constitution as respectively interpreted by Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) and Butterworth v. Fluellen, 389 So.2d 968 (Fla. 1980).

The speedy trial rule was originally promulgated by this Court as the procedural means through which this right could be enforced in this State. State ex rel. Maines v. Baker, 254 So.2d 207 (Fla. 1971); State ex rel. Butler v. Cullen, 253 So.2d 861 (Fla. 1971). As observed in King v. State, 303 So.2d 389 (Fla. 3d DCA 1974), there is nothing magical about the specific time periods established by the rule when measured against a defendant's right to a speedy trial.

Against the circumstances of this case, the record reflects (at best) dilatory and (at worst) sandbagging tactics. Petitioner has never been interested in obtaining a speedy trial, but only in obtaining a speedy discharge. That counsel for Petitioner sought to withdraw as counsel does not, per se, open a procedural escape hatch to avoid prosecution. Here, an appearance of a procedural maneuver to avoid trial on the merits looms.

The reasoning of Judge Boardman is sound:

> In the case sub judice, however, appellant's trial date had been set at the time of the public defender's withdrawal. Defense counsel's abrupt departure from the case not only lead to a redocketing of the pretrial conference, but also to a continuance of appellant's trial to facilitate appointment of substitute counsel and his preparation for trial.[5] Under these circumstances, we believe the failure to hold trial within the speedy trial period must be attributed to defense counsel's eleventh

> hour withdrawal and the resulting continuance necessitated by it. Having waived the protection of the 180-day speedy trial rule as a result of this continuance, appellant was not entitled to discharge under constitutional speedy trial principles on December 7, 1982. Butterworth v. Fluellen, 389 So.2d 968 (Fla. 1980); State ex rel. Butler v. Cullen, 253 So.2d 861 (Fla. 1971).
>
> (text of 438 So.2d at 973)

This court in Butterworth v. Fluellen, 389 So.2d 968, 969 (Fla. 1980) ruled: "We expressly hold that the ninety-day provision in rule 3.191(d)(3) is applicable only after a 'pending motion for discharge' has been denied by the court on grounds of a continuance or delay attributable to the accused.

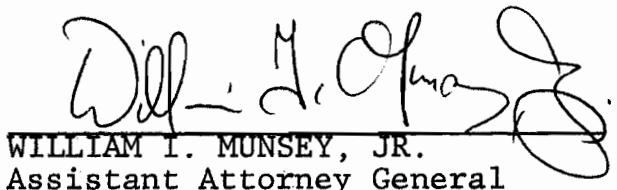
The cure to problems such as this is that if a defendant, in good faith, seeks a "speedy discharge", a demand should be filed and heard in open court. See, In Re: Petitioner to Amend Rule 3.191, Fla. R. Crim. P., Case No. 65,071, argued April 30, 1984. Otherwise, the "State" would suggest that as an operation of law this Court must affirm the resultant continuance recognized by the Second District.

CONCLUSION

WHEREFORE, based on the foregoing reasons, arguments, and authority, Respondent prays that this Court will affirm the decision of the Second District.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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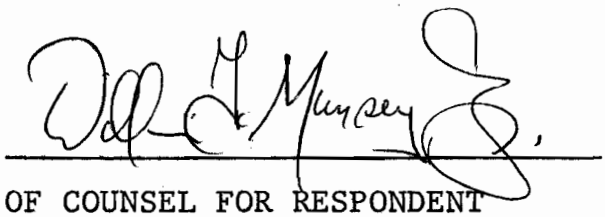
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830 on this 1st day of May, 1984.



OF COUNSEL FOR RESPONDENT