FILED
SID J. WHITE
APR 13 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

RONALD EDWARD HILL, :

Petitioner, :

vs. : Case No. 64,493

STATE OF FLORIDA, :

Respondent. :

______________________________ :

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

PAUL C. HELM
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE DIVISION

Hall of Justice Building
455 North Broadway
Bartow, FL 33830-3798
(813) 533-1184; 0931

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

PAGE NO.

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 4

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 REDOCKETED FOR A LATER DATE, PETITIONER NEVER REQUESTED A CONTINUANCE, AND THE COURT NEVER ORDERED AN EXTENSION OF THE SPEEDY TRIAL PERIOD.

CONCLUSION 8

CERTIFICATE OF SERVICE 8

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Ballard v. Kaney 397 So.2d 1042 (Fla. 5th DCA 1981)	6
Butterworth v. Fluellen 389 So.2d 968 (Fla. 1980)	4,5
Christopher v. State 369 So.2d 97 (Fla. 2d DCA 1979)	7
Ehn v. Smith 426 So.2d 570 (Fla. 5th DCA 1983)	7
Fulk v. State 417 So.2d 1121 (Fla. 5th DCA 1982)	6,7
Gue v. State 297 So.2d 135 (Fla. 2d DCA 1974)	6
Hammock v. State 330 So.2d 522 (Fla. 1st DCA 1976) cert.den., 341 So.2d 1085 (Fla. 1976)	7
Hill v. State 438 So.2d 971 (Fla. 2d DCA 1983)	4,5
Hogan v. State 305 So.2d 835 (Fla. 1st DCA 1974), cert.den., 312 So.2d 757 (Fla. 1975)	7
Muller v. State 387 So.2d 1037 (Fla. 3d DCA 1980)	6
Saunders v. State 436 So.2d 166 (Fla. 2d DCA 1983)	5,6
State ex rel. Butler v. Cullen 253 So.2d 861 (Fla. 1971)	4,5
State v. J.H. 295 So.2d 698 (Fla. 1st DCA 1974)	7
Strickland v. State 435 So.2d 934 (Fla. 1st DCA 1983)	4,5,6
Stuart v. State 360 So.2d 406 (Fla. 1978)	5,6
OTHER AUTHORITIES:	
Florida Rule of Criminal Procedure 3.191(a)(1)	4
Florida Rule of Criminal Procedure 3.191(d)(2) and (f)	6

STATEMENT OF THE CASE AND FACTS

Petitioner and five other inmates escaped from Polk Correctional Institution on June 9, 1982, assaulting a correctional officer and driving a dump truck through the compound fence in the process. (R66,67) Petitioner was recaptured the next day, placed in administrative confinement, advised of this Miranda rights, and questioned. (R67,70,71,78-84) While the record presents conflicting testimony as to whether Petitioner was formally arrested or apprised of the charges against him after his recapture (R71,73-84), a prison official present during questioning concluded that Petitioner clearly "knew that he was charged with escape" during this administrative detention and interrogation. (R83,84) Under these circumstances, the State concedes that the 180-day speedy trial period commenced on June 10, 1982, when Petitioner was taken into custody as a result of the criminal episode giving rise to the crimes charged. Hill v. State, 438 So.2d 971 (Fla. 2d DCA 1983). Like his cohorts, Petitioner was charged by information with escape, assault by a prisoner, and criminal mischief on August 17, 1982 (R1-3), and assigned to receive representation by the public defender's office on September 9, 1982. (R6,7,43)

At a pretrial conference on November 2, 1982, Assistant Public Defender Robert Antonello moved to withdraw as defense counsel for all six inmates on the basis of a conflict created by the prisoners' differing degrees of involvement in the escape and diverse defense strategies. (R10,11,17,22,27,32,37-39,48) Antonello explained that his withdrawal came at this juncture of

the proceedings--nearly two months after his appointment and one week before trial--because his initial hope of resolving all six cases by pleas had been thwarted by four inmates' recent decisions to go to trial. (R37-39,43) Antonello further stated that it was the policy of his office to "stay with the case until a real conflict [arose]." (R38) The court granted Antonello's motion, informed each defendant that substitute counsel would be appointed, and continued each case until November 23, 1982, the next pretrial date. (R11,17,18,22,23,27,32,33,41,42,50) The court did not enter any order extending the original speedy trial period, nor did the parties stipulate to such an extension. Neither Petitioner nor Antonello requested a continuance or waived speedy trial. (R11-13)

On November 5, 1982, the court appointed attorney Dan Brawley to represent Petitioner. (R50) Brawley moved for Petitioner's discharge on December 7, 1982, alleging that Petitioner had been taken into custody on June 10, 1982, and held in custody, continuously available for trial, for more than 180 days. (R52,53) Neither Brawley nor Petitioner requested a continuance or waived speedy trial between November 5, 1982, and December 8, 1982. (R50-58)

The trial court held an evidentiary hearing on Petitioner's motion for discharge on December 8, 1982 (R58-64,69-85), and ultimately denied it after finding that it had been "imminently necessary" to reschedule Petitioner's trial and that Petitioner could not "possibly have gone to trial as scheduled." Had this been a "gross case," however, where the delay in bringing

Petitioner to trial "was grossly over the limits," the court stated that it would have granted Petitioner's motion. (R89-93,99) Having previously accepted Petitioner's nolo contendere plea contingent upon the denial of his motion for discharge (R58-60,64-69,93,94), the trial court adjudicated Petitioner guilty of escape and the reduced charge of aggravated assault [1/] and sentenced him to concurrent terms of ten years and five years imprisonment. (R94,100-104)

On appeal to the District Court of Appeal, Second District, Petitioner argued that the trial court erred by denying his motion for discharge because more than 180 days had elapsed since he was taken into custody, he was continuously available for trial, never requested a continuance, and no valid order extending the speedy trial time had been entered. The District Court held that the failure to hold trial within the speedy trial period was attributable to defense counsel's withdrawal and the continuance necessitated by it, so Petitioner had waived the protection of the 180 day speedy trial rule. The District Court affirmed Petitioner's judgment and sentences.

Petitioner filed a timely notice invoking this Court's discretionary jurisdiction. This Court accepted jurisdiction of this case on March 28, 1984.

1/ The State agreed to nolle prosequi Petitioner's criminal mischief charge in exchange for his nolo contendere plea on the charges of escape and aggravated assault, a stipulated lesser included offense of the charged offense of assault by a prisoner. (R58,59)

ARGUMENT

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 REDOCKETED FOR A LATER DATE, PETITIONER NEVER REQUESTED A CONTINUANCE, AND THE COURT NEVER ORDERED AN EXTENSION OF THE SPEEDY TRIAL PERIOD.

Florida Rule of Criminal Procedure 3.191(a)(1) required the State to bring Petitioner to trial within 180 days after he was taken into custody. Strickland v. State, 435 So.2d 934, 935 (Fla. 1st DCA 1983). In the District Court of Appeal, Second District, the State conceded that Petitioner was taken into custody and the 180 day speedy trial period commenced on June 10, 1982. Hill v. State, 438 So.2d 971 (Fla. 2d DCA 1983). Petitioner filed a motion for discharge on December 7, 1982, the 181st day of custody. (R52,53) The motion was heard on December 8, 1982, (R58,60-64,69-85) and denied on January 12, 1983. (R89-93,99)

The District Court of Appeal, Second District, affirmed the denial of Petitioner's motion for discharge on the ground that the protection of the 180 day speedy trial rule was waived when Petitioner's original court-appointed counsel withdrew as counsel at the pretrial conference on November 2, 1982, one week before trial was scheduled, and the court rescheduled the pretrial conference for November 23, 1982. (R10,11,43) Id., 438 So.2d at 973. The Second District relied upon this Court's decisions in Butterworth v. Fluellen, 389 So.2d 968 (Fla. 1980), and State ex rel. Butler v. Cullen, 253 So.2d 861 (Fla. 1971), in finding the waiver.

The Second District's reliance on Butterworth and Butler was misplaced. Both cases hold that a criminal defendant waives the protection of the 180 day provision of the speedy trial rule when he requests and is granted a continuance. Neither Petitioner nor his counsel ever requested a continuance; the court entered the continuance upon its own motion. (R10-13) Furthermore, there is no record of any defense request for a continuance from the appointment of substitute counsel on November 5, 1982, to the hearing on the motion for discharge on December 8, 1982. (R50-60)

It is well established that the silence of the defendant and his counsel when trial is set beyond the speedy trial period does not constitute a waiver of the protection of the speedy trial rule. Stuart v. State, 360 So.2d 406, 411, 413 (Fla. 1978); Strickland v. State, supra, 435 So.2d at 935; Saunders v. State, 436 So.2d 166, 168 (Fla. 2d DCA 1983). It follows that Petitioner and his counsel did not waive Petitioner's right to the protection of the speedy trial rule by their silence when the trial court rescheduled the pretrial conference to a date within the 180 day time limit. (R10-13)

The Second District also noted that because Petitioner's original counsel had admitted concentration on negotiating pleas for Petitioner and his co-defendants (R37-39), the trial court could have concluded that substitute counsel could not be prepared to try the case by the scheduled trial date, and good cause existed for entering a continuance upon the court's own motion. Hill v. State, supra, 438 So.2d at 973 n.5. However, participation in plea negotiations neither tolls nor waives the

speedy trial time. Stuart v. State, supra, 360 So.2d at 410; Fulk v. State, 417 So.2d 1121, 1124 (Fla. 5th DCA 1982); Ballard v. Kaney, 397 So.2d 1042 (Fla. 5th DCA 1981).

There was no reason to presume that substitute counsel, appointed on November 5, 1982, could not be prepared to try the case within the speedy trial time, which did not expire until December 6, 1982. Thus, there was no reason for the trial court to extend the speedy trial time. Had substitute counsel needed more time to prepare, he could have requested a continuance and waived speedy trial. That he did not request a continuance demonstrates that he did not need more time to prepare.

Furthermore, an extension of the speedy trial period for exceptional circumstances under Florida Rule of Criminal Procedure 3.191(d)(2) and (f) cannot be presumed in the absence of an express order and finding of exceptional circumstances prior to the running of the time. Stuart v. State, supra, 360 So.2d at 413; Strickland v. State, supra, 435 So.2d at 935; Muller v. State, 387 So.2d 1037, 1039 (Fla. 3d DCA 1980). Since the trial court never ordered an extension of time for exceptional circumstances (R10-60) no extension can be presumed to justify the failure to try Petitioner within the 180 day speedy trial time.

In the absence of a waiver of speedy trial by Petitioner or his counsel or an express order of the court extending the speedy trial period for exceptional circumstances, it was the State's burden to bring Petitioner to trial within the 180 day speedy trial time. Saunders v. State, supra, 436 So.2d at 169; Gue v. State, 297 So.2d 135 (Fla. 2d DCA 1974). When the State

failed to do so, Petitioner was entitled to discharge on the 181st day. Christopher v. State, 369 So.2d 97 (Fla. 2d DCA 1979).

The withdrawal of Petitioner's original counsel because of conflict of interest (R11,37-39,48) did not render the State's failure to bring Petitioner to trial within 180 days attributable to Petitioner or his counsel. Fulk v. State, supra, 417 So.2d at 1123. The withdrawal of counsel on the basis of conflict did not constitute a waiver of speedy trial. State v. J.H., 295 So.2d 698, 699 (Fla. 1st DCA 1974). Nor did it create an exceptional circumstance which would have justified an extension of the speedy trial period had the trial court entered an order of extension. Ehn v. Smith, 426 So.2d 570, 572 (Fla. 5th DCA 1983); Hammock v. State, 330 So.2d 522, 524 (Fla. 1st DCA 1976), cert.den., 341 So.2d 1085 (Fla. 1976); Hogan v. State, 305 So.2d 835, 836 (Fla. 1st DCA 1974), cert.den., 312 So.2d 757 (Fla. 1975).

Under these circumstances, the failure to bring Petitioner to trial within the 180 day time period of the speedy trial rule was attributable solely to the State's failure to monitor the case and insure that it was redocketed within the speedy trial period. Ehn v. Smith, supra, 426 So.2d at 573. Since the State failed in its responsibility, Petitioner was entitled to discharge. The trial court erred by denying Petitioner's motion for discharge, and the Second District erred by affirming the denial. The Second District's decision must be quashed, and the cause remanded with directions to discharge Petitioner.

CONCLUSION

Because the failure to bring Petitioner to trial within the 180 day time limit of the speedy trial rule was attributable solely to the State, Petitioner respectfully requests this Honorable Court to quash the decision of the District Court of Appeal, Second District, and remand this cause with directions to discharge Petitioner.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

Paul C. Helm
PAUL C. HELM
Assistant Public Defender

Hall of Justice Building
455 North Broadway
Bartow, FL 33830-3798
(813) 533-1184; 0931

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 11th day of April, 1984

Paul C. Helm
PAUL C. HELM

PCH:rkm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 30th day of April, 1984

PAUL C. HELM

PCH:rkm