IN THE SUPREME COURT OF FLORIDA

ALTHA B. GILLESPIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 64,682

PETITIONER'S INITIAL BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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I PRELIMINARY STATEMENT

Petitioner, ALTHA B. GILLESPIE, was the defendant in the trial court, the appellant in his appeal to the First District Court of Appeal, and will be referred to herein as Petitioner. Respondent, the State of Florida, was the prosecuting authority at the trial level and the appellee on appeal.

The record on appeal consists of eleven volumes: one volume of pleadings, labeled Volume I, which will be referred to as "R"; eight volumes of transcripts, labeled Volumes II through IX, which will be referred to as "T"; and a supplemental volume of transcripts, which will be referred to as "SR" and "ST", respectively.

The District Court of Appeal, by order dated December 10, 1982, judicially noticed the record in Gillespie v. Nimmons, Case No. AJ-297.

II STATEMENT OF THE CASE AND FACTS

Petitioner, who was arrested July 7, 1981, was charged by information (Case No. 81-6271-CF) with sexual battery upon Celeste Lorene Totty, in violation of Section 794.011(3), Florida Statutes (R 1,5). Following discovery proceedings (R 7-43, 46-57), the case was called for trial November 16, 1981. At that time, the state entered a nolle prosequi of the charge (R 75,81,84,89,1386, T 13,23). The charge was reinstated December 4, 1981, by the state filing a new information (Case No. 81-10290-CF) (R 58). That same date, the state filed its notice of intent to rely upon similar fact evidence (R 59). Petitioner was arraigned on the charge and the public defender was appointed on December 7, 1981 (T 4-5).

December 8, 1981, petitioner filed a motion for sanctions seeking the exclusion at trial of any similar fact evidence and of any new witnesses or evidence (R 75-77, T 12-36). The trial court denied the motion (R 80).

December 9, 1981, the trial court, by written order, set the case for trial on December 14, 1981 (R 81).

December 11, 1981, petitioner filed a second motion for sanctions in which he sought a continuance of the trial attributable to the state (R 84-86, T 88-91). In light of the trial court's ruling refusing to attribute the delay to the state, petitioner was forced to request a continuance of the trial (R 91, R 88).

January 13, 1982, petitioner filed a motion seeking discharge under Rule 3.191, Florida Rules of Criminal Procedure (R 89-90, T 108-109, 112-115, ST 2, R 100-101). The motion for discharge was denied February 1, 1982 (SR 3).

Jury trial commenced February 1, 1982 (T 118).

Celeste Totty testified that on April 24, 1981, she was a ninth grade student at Landon Junior High School (T 443-445). Around 10:40 a.m., Ms. Totty left her class to go to the second floor bathroom (T 447). While she was washing her hands, a man, whom she identified as petitioner, exited one of the stalls, stating, "Oh, this must be the girl's bathroom." (T 447). When Ms. Totty turned to leave the bathroom, she realized the man, who was holding a silver pocket-knife, had blocked her path (T 448-449). The man then told her to go into the bathroom stall farthest from the door (T 449-450). First, the man had her lean over the toilet while he tried to enter her posteriorly (T 453-454). When that was unsuccessful, the man told Ms. Totty to turn around facing him and he tried again (T 454-455). After Ms. Totty was instructed to lie on the floor, the man was then able to slightly penetrate her with his sexual organ (T 445-456, 457-458).

Ms. Totty testified that later that day, she was shown numerous photographs at the police station. She tentatively identified a photograph of Dewayne Wright as that of her assailant (T 460, 481, 529-534). About a week later, Ms. Totty was shown a yearbook picture of Dewayne Wright, which she again tentatively identified (T 461, 481, 956-959). July 7, 1981, Ms. Totty was shown a second photospread from which she identified petitioner (T 461-462, 481-482, 551-555). Ms. Totty acknowledged that she thought all three photographs she identified were of the same individual (T 481-483, 485).

Officer Warren testified that the photograph of Dewayne Wright was shown to Ms. Totty because information had been received that he was a possible suspect (T 528-529, 565-566, see also 430-431).

Dr. Swartzendruber, accepted as an expert in obstetrics and gynecology, testified that he examined Ms. Totty April 24, 1981. In his opinion, sexual intercourse had occurred (T 582-590, 616). He also collected pubic combings, washings, swabs, and saliva and blood specimens from her (T 596).

Pursuant to court order, blood and saliva samples were taken from petitioner (T 566-571). Blood samples were also obtained from Dewayne Wright (T 631-632).

Dr. James Pollack, accepted as an expert in the field of forensic serology, testified that from testing, he determined that Ms. Totty could have had intercourse with either a type B secreter, a type O secreter, or a non-secreter (T 697, 652-696). From his test, he could not determine the PGM type of Ms. Totty's assailant (T 698). Based upon the testing and FBI population statistics, he determined that the donor of the sperm could fit within 64% of the population (T 709). From testing petitioner's blood, Dr. Pollack determined that he was a type B secreter with PGM type 1 and a peptidase type 2-1 (T 712), which would be consistent with the class of individuals who could have had intercourse with Ms. Totty (T 713). Dr. Pollack also determined from testing Dewayne Wright's blood that he was an A secreter with PGM type 1 and peptidase type

2-1, who therefore could not have had intercourse with Ms. Totty (T 714-715).

Officer Moneyhun testified that after arresting petitioner in the early morning hours of July 8, 1981, he interrogated him (T 730, 758-764). Although petitioner initially repeatedly denied any involvement in the rape, eventually, he admitted raping Ms. Totty (T 764-776, see also T 813-821). Petitioner stated that he had parked his car near the front door of Landon Junior High School, and then had walked into a stall in the second floor girl's restroom (T 773-774). When a young girl came into the bathroom, he stepped out of the stall holding a steak knife in his right hand (T 774). He indicated he led the girl into the last stall and attempted intercourse from the front standing up. When that was unsuccessful, he then tried to have intercourse with her from the rear standing up. When that failed, he laid her down on the floor and had intercourse with her (T 775, State's Exhibit 31).

Officer Snyder, an evidence technician, testified that on April 24, 1981, he processed the girl's bathroom at Landon Junior High School (T 835-839). He lifted several prints from the wall of the bathroom stall (T 839-842, 918-923). A print lifted from above the toilet tissue holder was identified by Officer McCoy, accepted as an expert in fingerprint identification, as matching the palm print of petitioner (T 843, 854-878). The other prints lifted from the bathroom stall did not match petitioner's prints (T 926-927).

Over petitioner's renewed motion to exclude, motion in limine, request for a proffer and repeated motions for mistrial (T 500, 516, 590, 618-619, 636, 643, 683-684, 699, 756-757, 784, 821, 1174), the state introduced evidence of an alleged similar crime purportedly committed by petitioner (T 503-516, 552, 561-565, 592-594, 616-617, 642-649, 700-715, 776-786, 821-822).

Petitioner objected to the trial court's failure to instruct the jury on sexual battery with threats as a lesser included offense as requested (R 106, T 1184-1188, 1213, 1215, 1332).

Petitioner was found guilty as charged (T 1339).

Notice of appeal was timely filed (R 124).

On appeal to the First District Court of Appeal, petitioner contended, inter alia, that the denial of his motion for discharge was erroneous and that the failure to instruct the jury on the lesser offense proscribed by Section 794.011(4)(b), Florida Statutes (1981) constituted reversible error. The First District rejected petitioner's first issue without discussion, and in a 2 to 1 decision rejected the contention that the failure to instruct on the lesser offense, Section 794.011 (4)(b) was error, apparently on the basis that there was no evidence to support the lesser offense (A 1-3). Petitioner's timely motion for rehearing or rehearing en banc was denied. Notice to invoke this Court's jurisdiction based on decisional conflict was timely filed. By order of October 24, 1984, this Court accepted jurisdiction of this cause.

III ARGUMENT

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO INSTRUCT THE JURY AS REQUESTED, ON THE LESSER INCLUDED OFFENSE OF SEXUAL BATTERY BY THREATENING TO USE FORCE OR VIOLENCE LIKELY TO CAUSE SERIOUS PERSONAL INJURY, SECTION 794.011(4)(b), FLORIDA STATUTES (1981).

Petitioner was charged by an information with a violation of Section 794.011(3), Florida Statutes (1981)[1] which alleged that he "did commit a sexual battery upon [the victim] . . . and in the process thereof used or threatened to use a deadly weapon, to-wit: a knife" (R 58). During the charge conference, and by written motion, petitioner requested that the jury be instructed on Section 794.011(4)(b)[2] as a permissive lesser

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[1] Section 794.011(3) provides:

> A person who commits sexual battery upon a person over the age of 11 years, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury shall be guilty of a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

[2] Section 794.011(4)(b) provides:

> A person who commits sexual battery upon a person over the age of 11 years, without that person's consent, under any of the following circumstances shall be guilty of a felony of the first degree.
>
> * * *
>
> (b) When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious injury on the victim, and the victim reasonably believes that the offender has the present ability to execute these threats.

included offense of the crime charged (R 106, T 1185-1188). Over petitioner's objection, the trial court refused to so instruct the jury (T 1213, 1318-1319, 1332). Because the trial court erroneously failed to instruct the jury on the next immediate lesser included offense (one-step removed) of the offense charged, per se reversible error was committed. Lomax v. State, 345 So.2d 719 (Fla. 1977); State v. Abreau, 363 So.2d 1063 (Fla. 1978); State v. Simone, 431 So.2d 718 (Fla. 3d DCA 1983); Owens v. State, 437 So.2d 796 (Fla. 2d DCA 1983).

In the seminal case of Brown v. State, 206 So.2d 377 (Fla. 1968), this Court held that the trial court must instruct the jury on all lesser offenses which are covered by the accusatory pleading and supported by the evidence. "This fourth category comprehends those offenses which may or may not be included in the offense charged, depending upon, (a) the accusatory pleading, and (b) the evidence at trial." Id. at 383.[3] Since the offense of sexual battery by threatening to use force was comprehended within the information filed here and since the proof established such a threat, petitioner contends the offense proscribed by Section 794.011(4)(b) was a proper permissive lesser included offense on which the jury should have

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[3] The Brown category four lesser included offense has been retained in the schedule of lesser included offenses but has been renumbered and designated as a category two offense. In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 596-597 (Fla. 1981)

been instructed.

Numerous cases have held that Section 794.011(4)(b) is a lesser included offense of Section 794.011(3). In McClanahan v. State, 377 So.2d 240 (Fla. 2d DCA 1979), the Second District held that a charge of sexual battery by threatening to use a deadly weapon includes as a lesser offense sexual battery by threatening to use force likely to cause serious bodily injury. Accord, Smith v. State, 340 So.2d 1216 (Fla. 4th DCA 1976). Likewise, in Lake v. State, 380 So.2d 1120 (Fla. 2d DCA 1980), cert. denied 388 So.2d 1115 (Fla. 1980), the Court indicated that Section 794.011(4)(b), sexual battery by threatening to use force or violence likely to cause serious personal injury, was a lesser included offense of a charge of violating Section 794.011(3), sexual battery with a deadly weapon. Therein, the defendant was charged with a violation of Section 794.011(3) by an information alleging that he "did commit a sexual battery . . . and did threaten to use deadly weapons, to wit: a knife and a firearm. . . ." Id. at 1121. The defendant was found guilty of sexual battery with a weapon. On appeal, the defendant contended he was convicted of a non-existent crime. The Second District rejected this contention concluding that the defendant was, in fact, convicted of sexual battery by threatening to use force or violence likely to cause serious personal injury, Section 794.011(4)(b), which offense, the court held, was "a lesser included offense of the charge in the information." Id. at 1122. The Court reasoned that the

use of a weapon (as opposed to a deadly weapon) to commit a sexual battery was the equivalent of the threat of using force and violence likely to cause serious personal injury.

In Wagner v. State, 356 So.2d 867 (Fla. 4th DCA 1978), the defendant was charged with a violation of Section 794.011(3), sexual battery by using or threatening to use a deadly weapon. As did petitioner, the defendant requested an instruction, which the trial judge refused, on the first degree felony of involuntary sexual battery, Section 794.011(4)(b), sexual battery by threatening to use force or violence likely to cause serious personal injury. The evidence at trial revealed that the defendant had repeatedly threatened the victim with a long piece of pipe. The Fourth District held that the refusal to instruct on Section 794.011(4)(b) was reversible error. The Court concluded that this offense was a "category four" lesser included offense of the crime charged since the accusatory pleading and the evidence would support this lesser offense. With respect to the evidentiary aspect of the "category four" requirement, the Court stated:

> [T]he jury could have believed that appellant only used threats of force or violence likely to cause serious personal injury. . . .

Id. at 869.

Under the foregoing cases, the trial court's refusal to instruct the jury on the permissive lesser offense proscribed by Section 794.011(4)(b) constitutes reversible error. The allegation of use or threatened use of a deadly weapon suffices

to place the defendant on notice that threatened use of force likely to cause serious personal injury is also charged (the allegata requirement of a Brown category four lesser offense). McClanahan v. State, supra; Lake v. State, supra; Wagner v. State, supra. As in Wagner, the evidentiary aspect of a category two offense was also met. Evidence at trial showed threatened use of force by the display of a pocket knife (T 448, 775). A knife, like a pipe [Goswick v. State, 143 So.2d 817 (Fla. 1962; Jones v. State, 392 So.2d 18 (Fla. 1st DCA 1980)] may or may not be a deadly weapon depending upon its likelihood to produce death or great bodily injury. "Whether an object used as a weapon . . . is a deadly weapon is a factual question to be resolved by the finder of facts at trial." State v. Nixon, 295 So.2d 121, 122 (Fla. 3d DCA 1974). Accord, Goswick v. State, supra; M.R.R. v. State, 411 So.2d 983 (Fla. 3d DCA 1982) and cases cited therein. Here, although the evidence was undisputed that the victim was coerced by the threatened use of a knife, the jury, within its province, could find that the knife did not constitute a deadly weapon. As in Wagner, the jury could have believed that petitioner only used threats likely to cause personal injury. Similarily, as in Lake, the jury could have found that a weapon (rather than a deadly weapon) was used to commit sexual battery, which would support a conviction under Section 794.011(4)(b) since threatened use of a weapon (as opposed to a deadly weapon) is "the equivalent of the threat of using

force and violence likely to cause serious personal injury." Lake v. State, supra, at 1121. Therefore, since the allegata supported the charge on Section 794.011(4)(b) and since there was evidence as to this offense, petitioner was entitled to an instruction on Section 794.011(4)(b) as a permissive lesser offense of the crime charged. The failure to so instruct constitutes reversible error.

The District Court's rejection of this argument apparently was based upon its conclusion that there was a total lack of evidence as to the lesser offense of Section 794.011(4)(b). This conclusion is faulty in several respects.

First, as demonstrated by both Wagner and Lake, the fact that a knife was used in the commission of the sexual battery does not preclude the alternative finding that the threatening display of the knife involved the use of force or violence likely to cause serious personal injury in violation of Section 794.011(4)(b). The rationale of Wagner and Lake is not affected by the amendment to Rule 3.510, Florida Rules of Criminal Procedure. In re Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981). Rule 3.510(b) provides:

> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> * * *
>
> (b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as

to which there is no evidence.

[Emphasis supplied]. With respect to a category four offense (now offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence within category two), as opposed to a lesser degree offense or an attempt [Rule 3.490 and 3.510(a)], the provision of the new rule that there must be evidence of the lesser offense imposes no new substantive requirements. This is self-evident since, by definition, in order for an offense to constitute a "category four" lesser offense, the proof at trial was required to support the charge. Brown v. State, supra. Since the law at the time Wagner and Lake were decided required evidence of the lesser charge, as now, the holding of those decisions that Section 794.011(4)(6) is a proper lesser included offense of Section 794.011(3) has continued viability.

Secondly, the District Court's opinion appears to be based upon the faulty conclusion that as a matter of law a knife constitutes a deadly weapon. This implicit reasoning is evidenced by the majority's opinion which states:

> If there was any evidence whatsoever that a deadly weapon was not used it would have been reversible error for the trial judge to have refused to instruct on the lesser included offense. However, in this case, there was no evidence that a knife was not used and it was therefore proper for the trial judge to refuse to instruct on the lesser included

offense.[4]

Gillespie v. State, 440 So.2d 8, 9 (Fla. 1st DCA 1983). Even assuming uncontradicted evidence of the use of a knife, the jury was not required to find that the knife was a deadly weapon, State v. Nixon, supra, and thus there was evidence to support a finding that "a deadly weapon was not used." The opinion below also appears to erroneously conclude that because there was legally sufficient evidence to support a guilty verdict on the higher offense, the refusal to instruct on a lesser offense is proper.[5] Hand v. State, 199 So.2d 100 (Fla. 1967) clearly condemns this practice.

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[4] An even more basic misconception of criminal law is apparent from this passage. Even though the state presented evidence as to the use of a knife a jury could disbelieve this portion of the evidence or not be convinced of it beyond a reasonable doubt, and thus could conclude - even in the absence of contrary testimony or evidence - that sufficiently convincing evidence of the use of a knife was lacking.

[5] A comparison of the majority's opinion herein with the dissenting opinion in Wheat v. State, 433 So.2d 1290, 1293 (Fla. 1st DCA 1983), petition for review denied, 444 So.2d 418 (Fla. 1984), more clearly reflects the faulty analysis employed here. There, Judge Thompson, in his dissenting opinion, opined that there was no error in refusing to instruct on robbery with a weapon, robbery without a weapon, and petit theft, in a charged offense of robbery with a deadly weapon because since the only evidence adduced at trial showed that the defendant was guilty of the offense of robbery with a deadly weapon, there was no evidence of the necessarily lesser included offenses. This reasoning is fallacious since if, in proving robbery with a deadly weapon, the state disproves (i.e. no evidence) robbery with a weapon, robbery, and petit theft, then the defendant could not have been convicted at all of the higher offense since there was "no evidence" of most of the essential elements of the crime charged. While the present case is distinguishable in that a permissive rather than a necessarily included offense is involved, it is apparent that Judge Thompson's opinion reflects a misapprehension of the effect of the amendment to Rule 3.510 concerning the propriety of the refusal to instruct on lesser offenses as "to which there is no evidence."

Based upon the foregoing reasoning and authority, petitioner contends he is entitled to a new trial where the jury is given the alternative to find him guilty of the permissive lesser offense of Section 794.011(4)(b).

ISSUE II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR DISCHARGE THEREBY VIOLATING HIS RIGHT TO A SPEEDY TRIAL UNDER RULE 3.191, FLORIDA RULES OF CRIMINAL PROCEDURE.[6]

Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

Garrity v. New Jersey, 385 U.S. 493, 498 (1967). Petitioner was undeniably coerced to sacrifice his right to a speedy trial in order to enjoy his co-equal right to the effective assistance of counsel. Because petitioner cannot be forced to make such an unenviable choice, he is entitled to be discharged.

Petitioner was arrested July 7, 1981, and was charged by information (Case No. 81-6271 CF) with sexual battery (R 1,5). Therefore, in the absence of intervening circumstances, he was entitled to be brought to trial by January 3, 1982. Rule 3.191 (a)(1) Fla.R.Crim.P. (1980). Petitioner was not tried by that date, and because the failure to hold the trial cannot be attributed to him, petitioner contends he is entitled to be forever discharged from this charge.

Following his arrest, petitioner diligently prepared for trial (R 7-75). Trial was scheduled for November 16, 1981, at which time petitioner was prepared for trial. On that date, the state announced a nolle prosequi of the charge (R 75, 81, 84, 89, T 13, 23). Thereafter, the state continued garnering

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[6]Since this Court has jurisdiction of this cause, this issue may be considered. Trushin v. State, 425 So.2d 1126 (Fla. 1982).

evidence against petitioner (T 23-28). December 4, 1981, the state reinstituted the charge against petitioner by filing a new information (Case No. 81-10290-CF) (R 58). On that same date, the state, for the first time, gave notice of its intent to rely upon similar fact (Williams rule) evidence at trial (R 59). The state also gave notice of new evidence, formalized by an additional response to discovery dated December 8, 1981 (T 13-16, R 78). [One item of "new" evidence consisted of a palmprint, purportedly of petitioner, found at the scene of the crime. Fingerprint evidence had been the subject of a prior motion to compel discovery, which had been granted by the Court (R 22-25, 30-31). In response thereto, the state had advised that there was no fingerprint evidence (T 14-15, 24-25, 27).] Petitioner was arraigned on the charge and counsel appointed December 7, 1981 (T 4-5).

At a hearing held December 8, 1981, petitioner sought to exclude the similar fact evidence (R 66-67, 68-74, T 37-63). Petitioner also sought to exclude the similar fact evidence and the newly disclosed evidence because the late disclosure precluded effective preparation prior to trial (R 75-76, T 12-32). The trial court denied both motions (R 79-80). At the request of the state, the trial court set the case for trial on December 14, 1981 (R 81).

On December 11, 1981, petitioner filed a second motion for sanctions (R 84-86). Petitioner alleged that in light of the court's rulings on his motion to exclude and motion for

sanctions, it was impossible for him to be prepared for trial by December 14, 1981. Petitioner requested a continuance of the trial with the delay attributed to the state (R 84-86, T 88-91). The trial court denied petitioner's motion (T 91, 95). Because it was impossible to be prepared for trial, petitioner was then forced to request a continuance (T 91), which the trial court granted (R 88, 96). January 13, 1982, petitioner moved for discharge under Rule 3.191(a)(1), Florida Rules Criminal Procedure, which the trial court denied (R 89-90, 100-101, 111-112, 113, T 112-115, 1348). Petitioner contends that the denial of his motion for discharge was clearly erroneous.

In State ex rel Wright v. Yawn, 320 So.2d 880 (Fla. 1st DCA 1975), cert. denied 334 So.2d 609 (Fla. 1976), the court was presented with a case similar to that presented here. There, the defendant was not indicted until 142 days after his arrest. The defendant immediately commenced discovery in order to prepare his defense. The speedy trial period would expire May 22, 1975. At a hearing April 21, 1975, the state sought a trial date for May. The defendant objected to the trial date since only 19 days were afforded to prepare for trial. Nevertheless, the defendant diligently attempted to prepare for trial. May 7th, the defendant moved to continue the trial without prejudice to the defendant's right to speedy trial. A ruling on this motion was deferred until trial. At docket day May 12th, the trial was scheduled for May 27th. On May 23rd, the defendant

filed a motion for discharge. The trial court denied the motion finding that since the defendant was engaging in discovery, he was not continuously ready and available for trial. The First District ruled that the defendant was entitled to be discharged since he had been denied his right to speedy trial. The Court held:

> As revealed by the above, Wright attempted to beat the Hobson's choice but found himself caught in a "squeeze play." While we recognize the Supreme Court's holding in the Rubiera [v. Dade County ex rel Benitnez, 305 So.2d 161 (Fla. 1974)] case and agree with it in a situation where a defendant has had ample time between the filing of an indictment or information to engage in discovery procedures, we do not feel that the instant cause is controlled by Rubiera. The state, through its own inaction by failing for 142 days to return either an indictment or an information against a person, cannot force a defendant to choose between two co-equal rights.

Id. at 882.

Similarly, in Mulryan v. Judge, Division "C", 350 So.2d 784 (Fla. 1st DCA 1977), the court held that the defendant was entitled to a discharge under the speedy trial rules. The defendant therein was arrested January 18, 1977. An original information filed February 15, 1977, charged him with possession of stolen property. July 5, 1977, 168 days after the arrest, the state filed an amended information charging the defendant with burglary and grand larceny. Defense counsel then moved for a continuance chargeable to the state since the new charges required additional depositions in order to prepare for trial. The trial judge granted the motion for continuance but ordered

that the continuance tolled the speedy trial period. July 17, 1977, the 180 day speedy trial period elapsed. Thereafter, the defendant filed his petition for writ of prohibition with the appellate court. Relying upon Allen v. State, 275 So.2d 238 (Fla. 1973), State ex rel. Wright v. Yawn, supra, and Bryant v. Blount, 261 So.2d 847 (Fla. 1st DCA 1972), the First District ruled that the defendant was entitled to be discharged from prosecution.

The present case is identical. The delay in the trial herein cannot be attributed to petitioner. It is beyond cavil that petitioner was prepared for trial November 16, 1981. By nol prossing the case (thereby terminating petitioner's representation by the Public Defender's Office) while continuing its investigation, the state effectively thwarted any further preparation on the part of petitioner until the case was refiled and petitioner rearraigned on December 7, 1981. With the state's development of "new" evidence during the interim, the state totally "changed the name of the ball game." Mulyran at 785. The state then sought to require petitioner to be brought to trial six days later, December 14, 1981. December 11th, petitioner sought a continuance chargeable to the state. In light of the trial court's refusal to grant this motion, petitioner was then forced to request to continuance.

The trial court here erred in refusing to attribute the continuance to the state. See Crow v. State, 392 So.2d 919 (Fla. 1st DCA 1981), pet. for review denied 399 So.2d 1141

(Fla. 1981); Mulyran, supra; State v. Stell, 407 So.2d 642 (Fla. 4th DCA 1981) (where the state files a new information, in most circumstances, the defendant is entitled to additional time to prepare his defense. "Since the need for additional time results from the state's action, continuances are 'charged' to the state." Id. at 643). By this erroneous ruling, petitioner was then coerced into requesting a continuance. Although a defense continuance generally constitutes a waiver of the speedy trial protections, a coerced continuance cannot constitute an effective waiver of the right to a speedy trial. State ex rel. Wright v. Yawn, supra; Mulyran, supra; State v. Martins, 391 So.2d 781 (Fla. 4th DCA 1980); Sumbry v. State, 310 So.2d 445 (Fla. 2d DCA 1975)). Petitioner is therefore entitled to be discharged.

Petitioner recognizes that his speedy trial claim was presented to First District by a petition for writ of prohibition, Gillespie v. Nimmons, AJ-297. Petitioner contends, however, that the court's summary denial of that petition does not bar the present claim. First, a writ of prohibition is not one of right but one of sound judicial discretion, to be granted or refused according to the facts and circumstances of the particular case. State ex rel. Florida Real Estate Commission v. Anderson, 164 So.2d 265 (Fla. 2d DCA 1964); State ex rel. Washburn v. Hutchins, 101 Fla. 773, 135 So. 298 (1931). Several factors suggest that the denial of prohibition here was a discretionary matter and not a ruling on the merits.

The petition was filed February 1, 1982, the date the trial was scheduled to commence. The petition was denied February 4, 1982, by form order, without requiring a response from respondent. These factors would indicate that the denial of prohibition was an exercise of discretion and not a ruling on the merits. Further, it has been held that where an appellate court denies prohibition without opinion, said denial is not res judicata of the issues presented. Stearns v. Los Angeles City School District, 244 Cal. App.2d 696, 53 Cal. Rptr. 482 (1962). Most importantly, the petition for writ of prohibition itself was premature. As pointed out in the petition, the trial court had not yet ruled on the motion for discharge at the time prohibition was sought. Sherrod v. Franza, 427 So.2d 164 (Fla. 1983) held that although prohibition is available to test an order denying a motion for discharge based upon a violation of the speedy trial rule, "[p]rohibition will not lie until the defendant has first made a motion for discharge to the trial court and this motion has been denied." Id. at 164. Therefore, prohibition here was inappropriate, since at the time prohibition was sought the trial court had not yet denied the discharge motion. For the above reasons, petitioner submits that the denial of his petition for a writ of prohibition does not bar the present claim.

Based upon the authorities cited, petitioner contends therefore that he is entitled to be discharged.

IV CONCLUSION

For the reasons set forth in Issue II, petitioner seeks an order of discharge. Alternatively, under Issue I, he seeks a new trial.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Lawrence Kaden, The Capitol, Tallahassee, Florida; and by mail to Mr. Altha B. Gillespie, #082421, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 13th day of November, 1984.

GLENNA JOYCE REEVES
Assistant Public Defender