IN THE SUPREME COURT OF FLORIDA

THE HONORABLE CHARLES E. MINER,
CIRCUIT JUDGE, SECOND JUDICIAL
CIRCUIT, IN AND FOR LEON COUNTY,

Petitioner,

vs.

KELLI JEAN WESTLAKE,

Respondent.

CASE NO: 66,401

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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THE HONORABLE CHARLES E. MINER, CIRCUIT JUDGE, SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY,	:	
Petitioner,	:	
vs.	:	CASE NO: 66,401
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PRELIMINARY STATEMENT

Kelli Jean Westlake was the petitioner in the First District Court of Appeal. The Honorable Charles E. Miner, Circuit Judge, was the respondent. Parties will be referred to herein as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks to invoke the discretionary jurisdiction of this Court, pursuant to Article V, Section 3(b)(4), Constitution of the State of Florida, and Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, to review the decision of the First District Court of Appeal in Westlake v. Miner, 9 F.L.W. 2396 (Fla. 1st DCA, Nov. 15, 1984). The factual basis for the holding of the First District Court of Appeal is set forth within the body of the opinion as follows:

> Petitioner and a codefendant, Ralph Bevan, were charged in a single information with grand theft. Trial was originally set for February 29, 1984, but counsel for co-defendant Bevan filed a motion for continuance because of conflict, and waived defendant Bevan's right to speedy trial. As a result, at a February 19, 1984, docket sounding, trial was set for April 12, 1984. Only the judge and the prosecutor were present at the February 19, 1984, proceeding. On March 23, 1984, both defense attorneys and the prosecutor were present at a second docket sounding and all parties announced they would be ready for trial on April 12. Again on March 30, 1984, counsel for petitioner announced in open court that they would be ready for trial on April 12.
>
> On April 3, 1984, a hearing was held on defendant Bevan's motion for continuance,[2] the state's motion for extension of speedy trial due to exceptional circumstances, and petitioner's motion for severance. Petitioner's motion for severance was based on two grounds: (1) that a joint trial would violate Bruton v. United States, 391 U.S. 123 (1968), and (2) that severance was necessary to protect petitioner's right to a speedy trial if the continuance was granted for Bevan. The judge granted Bevan's motion for continuance and the state's motion to extend the speedy trial time. However, he denied the motion to sever finding no Bruton violation and without commenting on petitioner's speedy trial right.

> On April 23, 1984, five days after the time for speedy trial had run, petitioner filed a motion for discharge. At a hearing on May 2, 1984, petitioner's attorney argued that she had been continuously available for trial and that she had never waived her right to speedy trial but had in fact attempted to preserve the right by seeking a severance when her codefendant sought an extension beyond the speedy trial time. The judge denied the motion for discharge without commenting except to note that "I want to get something clarifying out of the District Court of Appeal on this subject. I think this would probably be a good case to take up."
>
> The only exceptional circumstances ever asserted by the state in support of the extension of speedy trial time was that "a delay is necessary to accommodate the codefendant Bevan, as per Rule 3.191(d)(2) and (f) of the Florida Rules of Criminal Procedure," and that "there is ample reason not to sever the trials of Bevan and Westlake in that all testimony, witnesses and evidence is identical for the proof of each defendant's case."

While granting respondent's petition for writ of prohibition and remanding the cause to the trial court with instructions to discharge the respondent, the First District Court of Appeal certified the following to be a question of great public importance:

> Is the convenience to the state of trying codefendants together a sufficient reason in and of itself to extend an objecting defendant's speedy trial time and deny a motion to sever when a delay is necessary to accommodate a codefendant?

By granting the petition for writ of prohibition the First District Court of Appeal clearly indicated its belief that the certified question should be answered in the negative.

In petitioner's "Statement of The Case and Facts" in his Brief on the Merits herein he complains that the First District

Court of Appeal failed to address his argument that respondent had waived her speedy trial rights by agreeing, at a docket sounding on April 6, 1984, to a trial date outside of the speedy trial period. It is worthy of note in this regard that a transcript of the docket sounding of April 6, 1984, was a part of the record below and clearly indicated that no waiver occurred (see Supplemental Appendix A to respondent's Reply to Petitioner's Response to Petition for Writ of Prohibition).

ARGUMENT

ISSUE

CONVENIENCE TO THE STATE OF TRYING CO-DEFENDANTS TOGETHER IS NOT A SUFFICIENT REASON IN AND OF ITSELF TO EXTEND AN OBJECTING DEFENDANT'S SPEEDY TRIAL TIME AND DENY HIS MOTION TO SEVER WHEN A DELAY IS NECESSARY TO ACCOMMODATE A CODEFENDANT.

This case presents a factual situation and an issue which arises frequently in the trial courts of this jurisdiction. Codefendants approach their scheduled joint trial date but one of the codefendants finds it necessary to secure a continuance of his trial to a date which is beyond the speedy trial period. In order to protect his right to a speedy trial, the other codefendant seeks a severance pursuant to Rule 3.152(b)(1), Florida Rules of Criminal Procedure, which provides that the Court shall order a severance of defendants and separate trials upon a showing that such order is necessary to protect a defendant's right to a speedy trial. The prosecutor resists and counters with a motion to extend speedy trial in accordance with Rule 3.191(d)(2)(ii) and (f)(5), Florida Rules of Criminal Procedure, which provides that the Court may extend speedy trial upon a showing that a delay is necessary to accommodate a codefendant and that there is reason not to sever the cases in order to proceed promptly with the trial of the defendant. The "reason" not to sever given by the prosecutor is that it would be more convenient for the state to prosecute both defendants in a single trial, rather than have to conduct two separate trials.

In reviewing the orders of the trial courts which were confronted with the foregoing situation, the First, Second and Fourth District Courts of Appeal have held that a defendant's right to a speedy trial takes precedence over the mere convenience to the state of trying him and his codefendant together. Therefore, when confronted with the foregoing situation the appellate courts have held that a trial judge should grant the defendant's motion for severance and deny the state's motion to extend speedy trial. Westlake v. Miner, 9 F.L.W. 2396 (Fla. 1st DCA, Nov. 15, 1984); Darby v. State, AT-124 (Fla. 1st DCA, Feb. 11, 1985); Rico v. State, 10 F.L.W. 25 (Fla. 2d DCA, Dec. 19, 1984); and Bustos v. Fleet, 10 F.L.W. 193 (Fla. 4th DCA, Jan. 16, 1985). Also see Machado v. State, 431 So.2d 337 (Fla. 2d DCA, 1983).

The foregoing opinions of the First, Second and Fourth District Courts of Appeal are firmly based upon sound policy considerations and are well reasoned in law. Public dissatisfaction with a system whereby defendants were brought to trial only when convenient for the prosecutor was the whole reason for creation of the right to speedy trial. If mere convenience to the state were to be the overriding concern, Article I, Section 16 of the Constitution of the State of Florida would not provide defendants with a constitutional right to a speedy trial; Section 918.015, Florida Statutes, which gives defendants the right to a speedy trial and directs this Court to provide procedures through which such right shall be realized, would never have been enacted by the Florida Legislature; and Rule 3.191, Florida Rules of Criminal Procedure, would not have been adopted by this Court. These constitutional, statutory and

procedural directives clearly express the priorities of the people of Florida, their legislators and the leaders of their judicial branch of government. A criminal justice system which provides for a trial only when such is convenient for the prosecutor is not acceptable. Both the accused and the general public deserve and rightfully expect resolution of criminal cases within a reasonable period of time. Such can never be realized, however, if prosecutorial convenience is given preference over the defendant's constitutional, statutory, and procedural right to a speedy trial. But such would be the exact result should this Court allow the lofty purposes of these provisions of law to be thwarted by allowing trial courts to regard trivial reasons for delay, such as prosecutorial convenience, as being "exceptional circumstances" justifying orders extending speedy trial. Avoidance of such results was the obvious reason for the language in Rule 3.191(f), Florida Rules of Criminal Procedure, which provides that "Exceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or forseeable delays". Rather, exceptional circumstances are only circumstances which justify delay "as a matter of substantial justice to the accused or the state or both."

Despite petitioner's arguments to the contrary, State v. Littlefield, 457 So.2d 558 (Fla. 4th DCA 1984), is not inconsistent with the holdings of the courts in Westlake, Darby, Rico and

Bustos (supra). Littlefield, in fact, was cited as precedent for the holdings in Rico and Bustos. Any notion that the Fourth District Court of Appeal holding in Littlefield conflicts with the holding of the First District Court of Appeal in Westlake must be discarded in light of the Fourth District Court of Appeal opinion in Bustos. There the Fourth District Court of Appeal granted the petition for writ of prohibition, certified the identical question which was certified by the Westlake Court and cited Littlefield as authority for its holding.

Further, petitioner places great emphasis on the fact that respondent did not file a demand for speedy trial. Such reliance is misplaced. Rule 3.191(a)(1), Florida Rules of Criminal Procedure, provides for a trial within 180 days of arrest for a felony "without demand". Rule 3.191(a)(2), Florida Rules of Criminal Procedure, independently provides for a trial within 60 days if a demand is made. Nevertheless, petitioner seems to imply that a demand for speedy trial under (a)(2) should be made in order to make the provisions of (a)(1) applicable. Petitioner further seems to imply that respondent's failure to demand a speedy trial under (a)(2) somehow amounts to laches or bad faith. Respondent would simply say that she has found no legal precedent for petitioner's construction of sub-sections (a)(1) and (a)(2) of Rule 3.191, Florida Rules of Criminal Procedure, nor is there anything within the record from the trial court to indicate that the respondent "sat on her rights", acquiesced in her codefendant's motions for continuance or failed to take appropriate actions to

preserve her right to speedy trial. As observed by the District Court below:

> Neither can it be said that petitioner somehow acquiesced in her codefendant's motion for continuance thereby waiving her right to speedy trial... On the contrary, the record reflects that petitioner promptly and expressly objected to the continuance requested by her codefendant and moved for severance partly for the purpose of preserving her right to speedy trial.

Westlake v. Miner, 9 F.L.W. 2396, 2397 (Fla. 1st DCA Nov. 15, 1984).

Next petitioner contends that respondent was not entitled to discharge because Rule 3.191(d)(3), Florida Rules of Criminal Procedure, provides that a motion for discharge may be denied where it is shown that "the failure to hold trial is attributable to ... a codefendant in the same trial." The Fourth District Court of Appeal considered and rejected this argument in Littlefield, supra, a case upon which petitioner relies herein. This Court should also reject this argument for at least two reasons. First, the record from the trial court does not indicate that petitioner made a finding that the failure to hold the trial of respondent within the speedy trial time was attributable to a codefendant (see Appendix L to Respondent's Petition for Writ of Prohibition). Secondly, the failure to hold the trial of respondent within the speedy trial time was, in fact, attributable to nothing more nor less than the trial court's decisions to deny respondent's motion to sever and to grant the prosecutor's motion to extend speedy trial, both decisions being based on the trial court's determination that convenience to the prosecutor should be given preference over respondent's right to a speedy trial.

As petitioner, by his failure to raise the argument, obviously recognizes, the provision in Rule 3.191(d)(3), Florida Rules of Criminal Procedure, authorizing denial of a motion for discharge where it is shown that "a time extension has been ordered under (d)(2)", is also of no assistance to petitioner. This is so because this Court clearly stated in State ex rel. Girard v. McNulty, 348 So.2d 311 (Fla. 1977), that an invalid extension of speedy trial is not a basis for denial of a subsequent motion for discharge.

Finally, petitioner asserts that a trial court's ruling that an exceptional circumstance exists should be treated as a conclusive finding of fact. Petitioner has a mistaken notion as to what is a factual determination and what is a mixed question of law and fact. The following factual findings, and these alone, are supported by the record from the trial court:

1. The codefendant needed a continuance.

2. The prosecutor wanted one trial, rather than two, since all the evidence was the same.

From these skeletal findings, the trial court reached a legal conclusion that an exceptional circumstance existed. Such conclusion does not preclude review by this Court. If it did, procedural speedy trial could very well become an extinct right and orders of extension never reviewable. What petitioner actually argues is that a trial court absolutely cannot abuse its discretion in this regard and such is patently unreasonable.

CONCLUSION

The opinion of the First District Court of Appeal, which answers the certified question in the negative, is squarely in accord with the holdings of the Second District Court of Appeal and the Fourth District Court of Appeal. The holdings of these courts are firmly based upon sound policy considerations and are well reasoned in law. Petitioner has provided this Court with no persuasive reason to disturb the prevailing precedents.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished to Lawrence Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida, and to Kelli Westlake, 2153 Falk Drive, Tallahassee, Florida 32303, this 25TH day of February, 1985.

MICHAEL E. ALLEN