IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

CASE NO. 66,401

KELLI JEAN WESTLAKE,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Kelli Jean Westlake was the Petitioner in the First District Court of Appeal. The State of Florida was the Respondent in the First District. The parties will be referred to as they appear before this Court.

The identical question certified by the First District in this case has also been certified by the Fourth District in Bustos v. Fleet, 10 F.L.W. 193 (Fla. 4th DCA, Jan. 16, 1985).

STATEMENT OF THE CASE AND FACTS

This case is before the Court on a question of great public importance certified by the First District Court of Appeal which granted Respondent's petition for writ of prohibition which was based on the following facts as stated by the First District in its slip opinion:

> 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 codefendant 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, 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 to 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."

Westlake v. Miner, No. AZ-213, at 2-3 (Fla. 1st DCA, Nov. 15, 1984), (footnote omitted).

The record filed in the First District contained an order filed by the trial court on April 19, 1984, which stated that at docket sounding on April 6, 1984, "the case had been continued and the State and Defense agreed upon a new trial date of June 8, 1984." See appendix to State's Response to Petition for Writ of Prohibition, A-1. Although the State argued in its response and on rehearing that by agreeing (before speedy trial had run) to a trial date outside of speedy trial, the defense had waived speedy trial, this argument was not addressed by the First District.

The State's argument in the First District was twofold. First, the State contended that speedy trial had been waived because the defense had affirmatively agreed to a trial date

outside speedy trial. Second, the State contended that the trial court had specifically found the applicability of the exceptional circumstance provided for in Fla.R.Crim.P. 3.191(f)(5) which allows the trial court the discretion to extend speedy trial upon a showing by the State "that a delay is necessary to accommodate a co-defendant, where there is reason not to sever the cases in order to proceed promptly with trial of the defendant." The State emphasized that the defendant had not filed a demand for speedy trial within 60 days, as contemplated by Fla.R.Crim.P. 3.191(c).

As stated previously, the First District ignored the State's argument that speedy trial had been waived prior to the expiration of speedy trial on April 18, 1984. The First District rejected the State's contention that the case was controlled by Rule 3.191(f)(5) and instead found that when the speedy trial rule was read in pari materia with Rule 3.152 which provides that a court shall order a severance upon a showing that such order is necessary to protect a defendant's right to speedy trial, a severance was required under the facts of Respondent's case. The court made no mention of the fact that the defendant had not demanded a speedy trial under Rule 3.191(c).

The First District recognized that there was no real authority to support its conclusion and the court certified the following question as one 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?

In its motion for rehearing, the State requested that the court alter the certified question to reflect the State's interests in judicial economy and efficiency rather than mere "convenience." The motion to modify the certified question was denied, rehearing and rehearing en banc were denied, and the State then timely filed its notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

It is well settled that the decision whether to grant a severance is within the sound discretion of the trial court. State v. Vazquez, 419 So.2d 1088, 1090 (Fla. 1982). When determining whether the trial court has abused its discretion, an appellate court should recognize the trial court's superior vantage point and should not reverse the trial court's exercise of his discretion if reasonable men could differ. Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). The trial court in this case did not abuse its discretion because it found that an exceptional circumstance existed which would justify the extension of speedy trial.

The lower court's opinion in this case, which purportedly placed a defendant's Rule 3.191 right to a speedy trial within 180 days over the State's right to judicial economy and efficiency in having codefendants tried together, is especially egregious because the defendant never filed a speedy trial demand under Rule 3.191(a)(2). Thus, had the defendant really wanted a speedy trial, she could have demanded one despite the trial court's denial of the motion to sever.

The lower court's opinion also was erroneous because it failed to take into account the provisions of Rule 3.191(d)(3) which provides that if a trial has not occurred within 180 days, a pending motion for discharge shall be granted unless a specific exceptional circumstance exists.

If, as in Respondent's case, a specific exceptional circumstance under Rule 3.191(f) is found, the defendant's right to a speedy trial is still protected because the defendant is entitled to be tried within 90 days of the denial of the motion for discharge.

ARGUMENT

ISSUE

THE DECISION OF THE LOWER COURT SHOULD BE REVERSED BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED RESPONDENT'S MOTION FOR SEVERANCE.

The First District found that Respondent's trial should be prohibited because speedy trial had run. Implicit in the First District's holding is a finding that the trial court abused its discretion when it denied Respondent's motion for severance which had been based in part on Respondent's contention that a severance was required in order to protect her right to a speedy trial if a continuance was granted to her codefendant. The State of Florida contends that the First District's granting of the writ was incorrect for several reasons.

This Court has made it very clear that the "[g]ranting or denying a requested severance is within the trial court's discretion, and the test on review is whether the trial court abused its discretion." State v. Vazquez, 419 So.2d 1088, 1090 (Fla. 1982); O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983); Crum v. State, 398 So.2d 810 (Fla. 1981); Menendez v. State, 368 So.2d 1278 (Fla. 1979).

The Court has also made it equally clear that when reviewing a discretionary act, an appellate court should recognize the trial court's superior vantage point and should apply the "reasonableness" test to determine whether the

trial court abused its discretion. "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

With the above standards in mind, the State submits that it should not be difficult for the Court to conclude that the First District incorrectly found that the trial court had abused its discretion. This is because Fla.R.Crim.P. 3.191(f)(5) specifically provides an exceptional circumstance that "a showing that a delay is necessary to accommodate a codefendant, where there is reason not to sever the cases in order to proceed promptly with trial of the defendant" will justify the trial court's ordering an extension of speedy trial. In Respondent's case, the trial court found that there was no reason to sever the cases under Bruton v. United States, 391 U.S. 123 (1963) and that Respondent's codefendant was entitled to a continuance based upon the fact that his lawyer was unavailable for trial. Specifically, the trial court reasoned:

> So we've got one defendant, and that is Mr. Bevan, who has previously moved for a continuance and waived speedy trial, and whose counsel is involved in the trial of a major case at this point and cannot be prepared, and I think that motion for continuance is well founded.

> Having crossed that bridge and granting the continuance to Bevan, we then took under consideration the defendant Westlake's motion to sever the defendants primarily on the basis of Bruton, and I have reviewed the file and the statements. It is my view that the statements there are sufficiently interlocking under--is it Parker v. Randolph? . . . Alright, under Parker v. Randolph, United States Supreme Court case under interlocking inculpatory statements, so that Bruton is not applicable and therefore gives rise to the extension of speedy trial under 3.191(d)(2) and its impact with subsection (f), I'm going to extend speedy trial for a period of 90 days.

Transcript of Motion to Continue hearing at 14, 15, appendix I to Petition for Writ of Prohibition.

Notwithstanding all of the above, the First District concluded that the trial court had abused its discretion when it denied the motion for severance. The First District based its decision upon the conflicting provisions of Fla.R.Crim.P. 3.152, which requires severance of defendants before trial in order to protect a defendant's right to a speedy trial, and Rule 3.191(f)(5) which provides an exceptional circumstance justifying extension of speedy trial in order to allow the State to try codefendants in one proceeding. Thus, once again, the people of the State of Florida have been deprived of an opportunity to try a defendant solely because of the defendant's manipulation of Rule 3.191--even though the State fully complied with Rule 3.191(d)(2) which allows speedy trial to be extended if the trial court finds an exceptional circumstance.

The fallacy behind the First District's decision should be readily apparent after the Court examines the Fourth District's recent opinion in State v. Littlefield, 457 So.2d 558 (Fla. 4th DCA 1984). In that two-to-one decision, the Fourth District affirmed the trial court's granting of a defendant's motion for discharge on the ground that the State should have moved for an extension of speedy trial because the exceptional circumstance under Rule 3.191(f)(5) existed. The court upheld the granting of the motion for discharge even though the defendant had not filed a motion for severance under Rule 3.152! The court stated:

> By making accommodation of a codefendant a basis for an extension, the provisions of rule 3.191(f) imply that the state must affirmatively request an extension, if such a situation is contemplated, in advance of the expiration of the speedy trial time. Under this procedure, the trial court can deal with the specific situation and balance the interests of the state in avoiding multiple trials against the interest of the defendant in receiving a speedy trial.

Id. at 457 So.2d 559.

If the Fourth District's recommended procedure in Littlefield looks familiar, it is because that is the exact procedure followed by the State in Respondent's case. The Fourth District upheld the granting of the motion for discharge because the State had not sought a continuance under Rule 3.191(f)(5). And the First District found that the trial court had abused its discretion even though the

State had followed what one district court of appeal has determined to be the correct procedure. What is the State supposed to do?

More importantly, what are the trial courts of this state supposed to do when confronted with Respondent's case and State v. Littlefield?

The State wishes to emphasize that the fallacy behind the First District's opinion in Respondent's case was aggravated by the fact that Respondent never filed a demand for speedy trial under Rule 3.191(a)(2). If a demand had been filed, then the defendant surely would have received within 60 days the speedy trial which she claims she wanted. In reality, the State submits that the defendant did not really want a speedy trial--she wanted only a speedy trial discharge.

Thus, the State contends that basic fairness should have dictated an opposite result by the First District because the defendant never filed a demand for speedy trial. Should, however, the Court disagree with this assertion, the State submits that the First District's opinion was wrong for a second reason. Rule 3.191(a)(1) provides in part that a speedy trial discharge shall be ordered if a defendant has not been brought to trial within 180 days--however the rule also provides that before granting the motion for discharge, the trial court shall make an inquiry under Rule 3.191(d)(3). That section of the rule provides that a 90 day extension shall be permitted if one of a

number of circumstances are found--significantly, Rule 3.191(d)(3)(ii) provides that the 90 day extension is to be ordered if "the failure to hold trial is attributable to the accused, a codefendant in the same trial, or their counsel." (Emphasis added)

Thus, Rule 3.191 implicitly protects the speedy trial rights of a defendant whose codefendant has obtained a waiver of speedy trial. In other words, what should have happened in Respondent's case is that once the trial court found the exceptional circumstance and Respondent moved for a discharge after 180 days had expired, trial should have been scheduled within 90 days. If trial was not scheduled for 90 days pursuant to Rule 3.191(d)(3), then the severance contemplated by Rule 3.152 should have been ordered and Respondent would have been promptly brought to trial.

Since, as the First District recognized, there is no clear cut case law on the subject, the State further contends that sound policy reasons require an opposite resolution of the issue than that reached by the First District. If the lower court's opinion is allowed to stand, it will be possible for defendants to manipulate the judicial system by deciding when their trials are going to be, thus removing the trial court's discretion completely. It cannot be disputed that the State has a legitimate interest in promoting judicial efficiency and economy. And as the Third District recognized in Abbott v. State, 334 So.2d 642 (Fla. 3d DCA 1976), cert. denied, 431 U.S. 968, 97 S.Ct. 2926,

53 L.Ed.2d 1064 (1977), "[j]udicial efficiency and economy dictate one trial where possible." (Emphasis added) While, of course, the State does not dispute that defendants have legitimate interests in obtaining speedy trials, it hardly seems fair to order a discharge when a defendant has never filed a demand for a speedy trial pursuant to Rule 3.191(a)(2), which it seems reasonable to assume was promulgated precisely for situations like that of Respondent who found herself allegedly thwarted from a speedy trial by the actions of her codefendant.

A final reason which demonstrates that the First District's opinion should be reversed was expressed by this Court in Sherrod v. Franza, 427 So.2d 161, 164 (Fla. 1983). In that case, the Court held that findings of fact made by the trial court at a hearing on a motion for discharge were "conclusive." The same rationale should apply to the trial court's finding of an exceptional circumstance under the speedy trial rule. Thus, it simply cannot be found under Canakaris, supra that the trial court abused his discretion when he denied the motion for severance in light of the fact that he found as a matter of fact that an exceptional circumstance existed--an exceptional circumstance specifically listed in the rule as justification for extending speedy trial.

The State wishes to emphasize that reversal of the First District's opinion will not require defendants to languish in jail or otherwise suffer. This is because a

defendant who is truly interested in a speedy trial would be able to get one within 60 days simply by filing a demand under Rule 3.191(a)(2). Also, a defendant who truly is interested in a speedy trial would be able to receive one under Rule 3.191(d)(3) within 90 days after filing a motion for discharge.

CONCLUSION

The State of Florida respectfully requests this Court once again to venture into the legal quagmire caused by Rule 3.191 and find that the Petition for Writ of Prohibition was incorrectly granted by the First District. If the lower court's opinion is not reversed, otherwise guilty defendants will continue to receive windfalls from a rule which was designed to prevent them from languishing in jail and the State will continue to be penalized unfairly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Andrew Thomas, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 6th day of February, 1985.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL