IN THE SUPREME COURT OF FLORIDA

J. LEONARD FLEET, JUDGE,)

Petitioner,)

v.)

CARLOS SERRATO BUSTOS,)

Respondent.)

_____)

CASE NO. 66,587

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Carlos Serrato Bustos was the petitioner in the Fourth District Court of Appeal. The Honorable J. Leonard Fleet was the respondent in the Fourth District. The parties will be referred to as they appear before this Honorable Court.

The identical question certified by the Fourth District in this case has also been certified by the First District in Westlake v. Miner, 9 F.L.W. 2396 (Fla. 1st DCA Nov. 15, 1984) and in Darby v. State, 10 F.L.W. 378 (Fla. 1st DCA Feb. 11, 1985).

STATEMENT OF THE CASE AND FACTS

This case is before the Court on a question of great public importance certified by the Fourth District Court of Appeal which granted respondent's petition for writ of prohibition which was based on the following facts as stipulated to by the parties below and found in respondent's petition for writ of prohibition and the appendices attached thereto:

Respondent, along with five (5) other individuals, was arrested on November 29, 1983, as the result of conduct which gave rise to the instant case. All six (6) individuals were magistrated on December 1, 1983. On December 16, 1983 a five (5) count Information was filed charging respondent in Count I with trafficking in cocaine and in Count II with conspiracy to traffic in cocaine, along with the other five (5) co-defendants. Respondent was arraigned on December 27, 1983 and a trial date was set for February 27, 1984. On February 14, 1984, the trial court allowed counsel for the Respondent to withdraw from the case. Respondent's present counsel made his first appearance in the case on February 27, 1984, the date the trial was to commence. A colloquy ensued in open court which included, in part, the following:

> Whereupon, the following proceedings were had:
> THE COURT: Carlos Serrato Bustos.
> Mr. Laswell is on the case.
> MR. LASWELL: I just entered my appearance.
> THE CLERK: He is here for the trial date.
> THE COURT: That's all been rescheduled.
> MR. LASWELL: That was my understanding, Judge. I was the last dying dog here.
> THE COURT: Everyone is reset. There has been so much confusion with the files. Where are the other files?

THE CLERK: We couldn't find the other files.
MR. LUMLEY: They were in the Judge's office.
THE CLERK: I guess I didn't have the files to delete them from the docket.
THE COURT: There are no new dates written on them but we are supposed to have all of them because of the discovery problem, that's why I took the files with me and I have got the new trial dates.
THE CLERK: All the trial dates will be the same then.
THE COURT: Mr. Laswell, have you filed your appearance?
MR. LASWELL: I just did. I have the whole packet and it is over at my office, but getting here at 8:30 is hard enough without having to go by the office.
THE COURT: Mr. Musa, will you come on up, please?
Will you stipulate to Mr. Musa's qualifications?
MR. LASWELL: Yes, sir.
Thereupon, pursuant to stipulation, NAYIP MUSA, was duly sworn to translate from English to Spanish and Spanish to English and to act as translator in these proceedings.
THE COURT: Confer with Mr. Bustos that Mr. Laswell will be his attorney of record. Tell Mr. Bustos that Mr. Laswell is Mr. Busto's attorney.
Are you ready?
MR. LASWELL: Yes.
THE COURT: The trial date will be Monday, June 4th, 9:00 A.M. The status conference will be -- the status conference is going to be May --
THE CLERK: 24th.
THE COURT: This one is a special exception. The status will be on May 24th.
THE CLERK: May 24th?
THE COURT: Yes.

(Appendix A to Petition For Writ of Prohibition)

On June 4, 1984, there was a conference involving the court and all counsel which resulted in the case being continued over the objection of the Respondent. On that same date, Respondent filed a Motion for Discharge alleging that he had been in custody in excess of one hundred eighty (180) days had not yet been

brought to trial (Appendix B to Petition for Writ of Prohibition). That motion was denied by the court on June 14, 1984 upon the authority of Fla.R.Crim.P. 3.191 (d)(3)(ii) and 3.191(f)(5). (Appendix D to Petition for Writ of Prohibition).

On June 29, 1984, Respondent filed a Renewed Motion for Discharge (Appendix C to Petition for Writ of Prohibition). That Motion was also denied by the court on July 26, 1984 (Appendix E to Petition for Writ of Prohibition).

On August 3, 1984, the trial court ordered that the trial would commence on August 13, 1984 (Appendix F to Petition for Writ of Prohibition). On August 13, 1984, when Respondent's counsel appeared for trial he learned that the case had been continued at the request of one of the attorneys for a co-defendant.

Respondent filed his Petition for Writ of Prohibition in the Fourth District Court of Appeal on August 22, 1984. The fourth district granted Respondent's Petition on November 28, 1984 on the authority of State v. Littlefield, 457 So. 2d 558 (Fla. 4th DCA 1984).

On December 6, 1984, Petitioner filed a Motion for Rehearing and/or Certification of Question. On rehearing, the fourth district certified the following question as one of great public importance:

> Is the convenience to the state of trying co-defendants 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 co-defendant?

Bustos v. Fleet, 10 F.L.W. 193 (Fla. 4th DCA Jan. 16, 1985).

SUMMARY OF ARGUMENT

The lower court erred in this case by placing a defendant's Fla.R.Crim.P. 3.191 right to a speedy trial within 180 days over the State's right to judicial economy and efficiency in having co-defendants tried together. This action is especially egregious since the Respondent never even filed a demand for speedy trial under Fla.R.Crim.P. (a)(2).

ISSUE ON APPEAL

WHETHER THE DECISION OF THE LOWER COURT SHOULD BE REVERSED BECAUSE RESPONDENT WAS NOT ENTITLED TO DISCHARGE UNDER FLA.R.CRIM.P. 3.191 (d)(3)(ii) AND 3.191 (f)(5).?

ARGUMENT

ISSUE

THE DECISION OF THE LOWER COURT SHOULD BE REVERSED BECAUSE RESPONDENT WAS NOT ENTITLED TO DISCHARGE UNDER FLA.R.CRIM.P. 3.191(d)(3)(ii) AND 3.191(f)(5).

The issue before this Honorable Court is essentially whether a single defendant's right to a speedy trial outweighs the State's interest in judicial economy and efficiency in trying co-defendants together. Logic dictates that there be one trial where possible. Florida Rule of Criminal Procedure 3.191(a)(1) provides:

> Speedy Trial without Demand. Except as otherwise provided by this Rule and subject to the limitations imposed under (b)(1) and (b)(2), every person charged with a crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor, or within 180 days if the crime charged be a felony, and if not brought to trial within such time shall upon motion timely filed with the court having jurisdiction and served upon the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion, shall make the required inquiry under (d)(3). The time periods established by this section shall commence when such person is taken into custody as defined under (a)(4). A person charged with a crime is entitled to the benefits of this Rule whether such person is in custody in a jail or correctional institution of this State or political sub-division thereof or is at liberty on bail or recognizance. This section shall cease to apply whenever a person files a valid demand for speedy trial under (a)(2).

Florida Rule of Criminal Procedure 3.191(d)(3) provides:

> Delay and Continuances; Effect on Motion. If trial of the accused does not commence within the periods of time established by this Rule, a pending motion for discharge shall be granted by the court unless it is shown that (i) a time extension has been ordered under (d)(2) and that extension has not expired, or (ii) the failure to hold trial is attributable to the accused, a co-defendant in the same trial, or their counsel, or (iii) the accused was unavailable for trial under section (3), or (iv) the demand referred to in section (c) is invalid. If the court finds that discharge is not appropriate for reasons under (d)(3)(ii), (iii), of (iv), the pending motion for discharge shall be denied provided however, trial shall be scheduled and commenced within 90 days of a written or recorded order of denial.

Section (f) of the above-cited rule further provides:

> Exceptional Circumstances. As permitted by (d)(2) of this Rule, the court may order an extension of the time periods provided under this Rule where exceptional circumstances are shown to exist. 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 foreseeable delays.
>
> Exceptional circumstances are those which as a matter of substantial justice to the accused or the State or both require an order by the court: Such circumstances include (1) unexpected illness or unexpected incapacity or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial; (2) a showing by the State that the case is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation and preparation within the periods of time established by this Rule; (3) a showing by the State that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time;

> (4) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial; (5) a showing 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; (6) a showing by the State that the accused has caused major delay or disruption of preparation of proceedings, as by preventing the attendance of witnesses or otherwise.

Thus, it is clear under the rule that where it is the fault of a co-defendant that the trial was not held within the speedy trial period, the motion for discharge shall be denied. That is the situation in the case at bar, and the motion for discharge should have been denied, not granted. See also, Grimett v. State, 383 So. 2d 698 (Fla. 4th DCA 1980).

In the instant case, the trial court denied Respondent's Motion for Discharge Upon the authority of Fla.R.Crim.P. 3.191(d)(3)(ii) and 3.191(f)(5). However, the Fourth District Court of Appeal granted Respondent's Petition fro Writ of Prohibition even though Respondent conceded that the record reflected "delays occasioned by his co-defendants and their counsel" and that he had never even filed a demand for speedy trial under Fla.R.Crim.P. 3.191(a)(2). Respondent further conceded that he had never even moved for a severance prior to filing his motion for discharge. The Fourth District granted the Petition for Writ of Prohibition on the authority of their recent decision 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.

Thus, the Fourth District has in effect, relieved a defendant of any responsibility under the Florida Rules of Criminal Procedure and has placed the onus on the State of Florida to show that a defendant is not manipulating the speedy trial rule to his own advantage and is instead truly interested in going to trial. 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.

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 himself allegedly thwarted from a speedy trial by the actions of his co-defendant.

It is highly unlikely that the drafters of Fla.R.Crim.P. 3.191 envisioned that the application of Rule 3.191(d)(3)(ii) and 3.191(f)(5) could be so distorted that it would not even apply to a situation such as that in the instant case, solely because of the manipulation and abuse of the rule by defendants. Sound policy reasons require the opposite resolution of this issue. Trial courts today are busier than ever and it is unreasonable to require that a complicated case with multiple co-defendants be tried separately at each defendant's whim. This Court should not condone this practice. Certainly the State's interest in trying co-defendants together is more than just a mere issue of "convenience."

A final reason which demonstrates that the Fourth 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.

The State wishes to emphasis that reversal of the Fourth 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 Fourth 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,

JIM SMITH
Attorney General
Tallahassee, Florida

Carolyn V. McCann

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on the Merits has been furnished by United States Mail to ANDREW SLATER, ESQUIRE, Office of the State Attorney, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Florida 33301, and WILLIAM T. LASWELL, ESQUIRE, 915 Middle River Dr., Suite 508, Fort Lauderdale, Florida 33304, this 14th day of March, 1985.

Carolyn V. McCann

OF COUNSEL