IN THE SUPREME COURT OF FLORIDA

J. LEONARD FLEET, JUDGE,

Petitioner,

vs.

CARLOS SERRATO BUSTOS,

Respondent.

CASE NO. 66,587

PETITIONER'S REPLY BRIEF ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, FL

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

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner relies on the preliminary statement contained in its initial brief.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts found in its initial brief.

SUMMARY OF ARGUMENT

Petitioner relies on the Summary of Argument contained in its initial brief.

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).

Respondent is correct in his assertion that it is the duty of the State and the trial court to bring a defendant to trial within the time prescribed by the speedy trial rule. Respondent has failed to realize however, that this duty is tempered by a defendants availability and willingness to go to trial. State v. Toyos, 448 So.2d 1135 (Fla.3d DCA 1984). In the instant case, 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). If Respondent had filed a demand for speedy trial, then Respondent surely would have received within sixty (60) days the speedy trial which he claims he wanted. In reality, the State submits that the Respondent did not really want a speedy trial--he only wanted a speedy trial discharge.

The State would also submit, that contrary to the Fourth District's decision in State v. Littlefield, 457 So.2d 558 (Fla. 4th DCA 1984), the State was not obligated to seek an extension under Fla. R. Crim. P. 3.191 (f)(5) and that Respondent's discharge was barred by Fla. R. Crim. P. 3.191 (d)(3)(ii). In the instant case Respondent, along with five other individuals,

was charged in a single information with trafficking in cocaine and conspiracy to traffic in cocaine. Respondent himself conceded below that the record reflected delays caused by his co-defendants and their counsel. The Trial Court denied Respondent's motion for discharge on the authority of Fla. R. Crim. P. 3.191 (d)(3)(ii) which states that a pending motion for discharge shall be denied if the failure to hold trial is attributable to the accused, a co-defendant in the same trial, or their counsel. It is interesting to note that the Trial Court also denied the motion on the authority of Fla. R. Crim. P. 3.191 (f)(5) which states that as permitted by Fla. R. Crim. P. 3.191 (d)(2), the State may seek an extension of speedy trial in order to accomodate a co-defendant where there is reason not to sever the cases. The trial court denied the motion to discharge on the authority of Rule 3.191 (f)(5) even though it was not necessary to do so since it is Rule 3.191 (d)(3)(i) and not Rule 3.191 (d)(3)(ii) which refers to Rule 3.191 (d)(2) which in turn refers to Rule 3.191 (f)(5) and the exceptional circumstances enumerated there. Had the motion for discharge been denied on the authority of Rule 3.191 (d)(3)(i) then the State would have a duty to show why the cases should not be severed. However, because the motion was denied on the authority of subsection (d)(3)(ii) the State had no such duty. The State never asked for a continuance under Rule 3.191 (f)(5) and never had to since under Rule 3.191 (d)(3)(ii) it was the fault of the co-defendants that the trial was not held.

The State submits that it is for same reasons that Littlefield, supra, was incorrectly decided and erroneously

applied to the case sub judice. A literal reading of Fla. R. Crim. P. 3.191 (d)(3)(ii) requires that a pending motion for discharge be denied if any delay in holding trial is attributable to a co-defendant or their counsel, not granted.

The State maintains that requiring prosecutors to respond to non-existent motions to sever is akin to requiring the State to employ mind reading techniques. This is clearly an unfair and impossible burden to place on the State especially when a defendant, such as Respondent, never even files a demand for speedy trial let alone a motion to sever. The State does not have the infinite resources to fund multiple trials based on the sheer speculation that a particular defendant may want his case severed from that of his co-defendants. A result such as that reached by the Fourth District begs for the manipulation of the speedy trial rule by defendants and is especially egregious where a defendant's constitutional right to a speedy trial is still protected. Our rules must be sensibly construed. They are not to be given a strained interpretation or stretched to the limit of every conceivable construction conjured up by the fertile imagination of counsel. Jordan v. State, 334 So.2d 589 (Fla. 1976). 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).

CONCLUSION

The State of Florida respectfully requests this Court once again to venture into the legal guagmire 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 be penalized unfairly.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, FL

Carolyn V. McCann

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Ave. Suite#204
W. Palm Beach, FL 33401
(305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply 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 St., Ft. Lauderdale, FL 33301, and WILLIAM T. LASWELL, ESQUIRE, 915 Middle River Dr., Suite#508, Ft. Lauderdale, FL 33304, this 15th day of April, 1985.

Carolyn V. McCann

OF COUNSEL