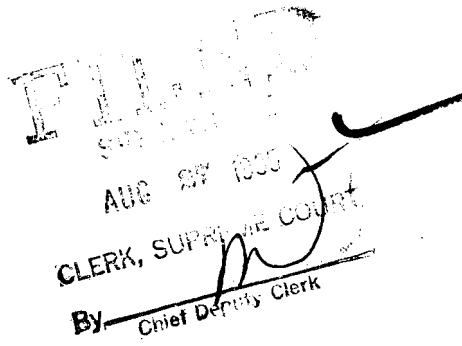
IN THE FLORIDA SUPREME COURT



RAYMOND STEWART,

Petitioner,

vs. CASE NO. 67,315

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

This is an appeal from the First District Court of Appeal's denial of the Petitioner's petition for writ of certiorari. The question on appeal was certified by the district court as being one of great public importance.

The Petitioner was the petitioner in the First District Court, the appellee in the Circuit Court, and the defendant in the County Court. The State of Florida, Respondent, was the prosecuting authority at the trial level, the appellant in the Circuit Court, and the respondent in the district court. The record on appeal consists of the Petitioner's petition for writ of certiorari and its attached appendices along with the State's response and its appendices. The petition will be referred to as "P", followed by the appropriate page number in parentheses. The State's response will be referred to as "R", followed by the appropriate page number in parentheses.

II. STATEMENT OF CASE AND FACTS

The Respondent agrees with the facts stated by the Petitioner but would add that the value of the bed sheets Petitioner was alleged to have stolen was $150.00. R-Appendix (A-1). The Respondent would also note that the State filed a nolle prosequi on the grand theft charge on January 17, 1984, and refiled it as a misdemeanor petit theft on January 23, 1984. R-Appendix (B-1, C-1).

III. SUMMARY OF ARGUMENT

Florida case law uniformly holds that a defense request for a continuance is a waiver of speedy trial not only on the offense charged, but also on all charges that arise out of the same criminal episode. Petitioner's argument is founded upon a case in which the crucial issue was the effect on the speedy trial period of a mistrial, not a waiver of speedy trial as occurred in the instant case. Further, Petitioner cites as support for his position criminal rules of procedure and case law which are inapplicable to the facts in the case now before the court because they, too, are founded on fact situations which lack the one fact crucial to to instant case--a defense waiver of speedy trial. The Petitioner ignores the vast body of case law with a fact sequence like that in the instant case, i.e., information/waiver of speedy trial/nolle prosequi/second information. It is upon this body of case law that the Respondent relies and upon which the First District Court of Appeal's opinion below is founded.

IV. ARGUMENT

ISSUE PRESENTED

IF THE STATE FILES A FELONY CHARGE AGAINST THE DEFENDANT AND THE DEFENDANT MOVES FOR A CONTINUANCE MORE THAN 90 DAYS BUT LESS THAN 180 DAYS AFTER HIS ARREST, AND THE STATE THEN NOL PROSSES THE FELONY CHARGE AND REFILES THE INFORMATION CHARGING A MISDEMEANOR, IS THE DEFENDANT ENTITLED TO AN IMMEDIATE DISCHARGE UNDER THE SPEEDY TRIAL RULE?

The precise issue before this Court has not been addressed in a recorded opinion before this case arose. However, there is a long line of cases which reach the same holding that the First District Court of Appeal reached below, i.e., a waiver of speedy trial for the crime with which a defendant is charged constitutes a waiver of speedy trial rights as to all charges arising from the criminal episode which gave rise to the original charge. State v. Albanez, 448 So.2d 596 (Fla. 2d DCA 1984); Goldstein v. State, 447 So.2d 903 (Fla. 4th DCA 1984); State v. Condon, 444 So.2d 73 (Fla. 4th DCA 1984); State v. Cocalis 443 So.2d 138 (Fla. 3rd DCA 1984); Gallego v. Purdy, 415 So.2d 166 (Fla. 4th DCA 1982); State v. Jones, 404 So.2d 395 (Fla. 5th DCA 1981); Conner v. State, 398 So.2d 983, 984 (Fla. 1st DCA 1981); State v. Kerper, 393 So.2d 77 (Fla. 5th DCA 1981); State v. Godoy, 392 So.2d 555 (Fla. 4th DCA 1980); State v. DeSimone, 386 So.2d 283 (Fla. 4th DCA 1980); Stevens v. State, 383 So.2d 1156 (Fla. 5th DCA 1980); State v. Corlew, 382 So.2d 787 (Fla. 2d DCA 1980); State v. Boyd, 368 So.2d 54 (Fla. 2d DCA 1979: dism. 379 So.2d 446 (Fla. 1979); Homer v. State, 358 So.2d 1176 (Fla. 3d DCA 1978); cert., den,. 364 So.2d 886 (Fla. 1978); State v. Luck, 336 So.2d 464 (Fla. 4th DCA 1976); Clark v. State, 318 So.2d 513 (Fla. 4th DCA 1975).

Petitioner ignores the opinion of the First District Court and those of the above cases, all of which specifically address the one factor crucial to this case, i.e., the effect of a waiver of speedy trial. Instead, Petitioner cites as authority only cases in which there was never a waiver of speedy trial. Whereas such cases are interesting, they are not relevant to the instant case. This Court should not be misled. The case law which is pertinent to the instant case is the case law on which the First District Court of Appeal relied and that which is cited above. In its opinion, the First District Court relied on Gallego v. Purdy, 415 So.2d 166 (Fla. 4th DCA 1982), in which it was stated:

> A defense continuance constitutes a specific waiver of the speedy trial rule (or, more properly, an estoppel precluding reliance on the rule) as to all charges which emanate from a single criminal episode. Id at 167.

The First District had previously relied upon the same rule of law in Conner v. State, 398 So.2d 983 (Fla. 1st DCA 1981), wherein it stated that a "waiver of speedy trial on the first information applie[s] also to a second information based on the same criminal episode." Id. at 984. This rule of law has been adopted by every district court and reiterated without qualification numerous times, as illustrated by State v. Albanez, supra, and the other fourteen cases cited above on page 2.

One of the more articulate statements of this rule was recently made in Goldstein v. State, supra. There, the facts were similar to those herein. The State filed an indictment. The defense requested a continuance, thus waiving speedy trial. The State amended the first indictment and filed a second indictment. The defendant filed a motion

for discharge. The defendant's contention was that when the State filed the second, amended indictment, the waiver of speedy trial made under the first indictment was vitiated, and the speedy trial clock once again started ticking as if the waiver had never occurred. The court ruled to the contrary, holding that a waiver of speedy trial on the first indictment also applied to a second indictment based on the same criminal episode. The court stated:

> [1] Butterworth v. Fluellen, 389 So.2d 968, 970 (Fla. 1980) restated the proposition that "the granting of the defendant's motion [for a continuance] does waive the 180-day provision [of the speedy trial rule]. . . ." The question presented here is whether such a waiver remains in effect when the state elects to file a second amended information or indictment. We addressed this question in Gallego v. Purdy, 415 So.2d 166, 167 (Fla. 4th DCA 1982), and held that "[a] defense continuance constitutes a specific waiver of speedy trial rule (or, more properly, an estoppel precluding reliance on the rule) as to all charges which emanate from a single criminal episode." In Gallego, after a defense continuance, the state filed an amended information which increased the amount of cocaine alleged to have been possessed by the defendant. Since it was undisputed that all of the cocaine came from the same criminal episode which formed the basis of the initial charge, we held that the filing of the amended information did not vitiate the existing waiver. The same principle applies here. It is patently obvious that the charges in the first and second indictments emanate from the same criminal episode. Consequently, we hold that the defendant's waiver of rights under the speedy trial rule continued in force and effect under both indictments. See State v. DeSimone, 386 So.2d 283 (Fla. 4th DCA 1980). Goldstein, supra, at 904 (Emphasis added.)

Petitioner's main argument, however, is founded on Weed v. State, 411 So.2d 863 (Fla.1982). But Weed is clearly inapplicable to the instant case, and Petitioner's argument must fail. First, the facts in

Weed are quite different from those in the instant case. The crucial fact on which the instant case turns, i.e., the defendant's waiver of speedy trial, was absent in Weed. In Weed there was never a waiver of speedy trial. The defendant's trial on a misdemeanor possession of marjuana resulted in a mistrial. The State refiled the charge as a felony. The defendant filed a motion for discharge on speedy trial grounds, which was granted. Thereafter the State moved to amend the information to a misdemeanor. The court rejected the amendment, and the State appealed. The issue in Weed concerned the operation of the speedy trial rule after a mistrial, not after a waiver of speedy trial. The second reason that Weed is not germane is because the Court's decision in Weed was based on Rule 3.191(g) of the Florida Rules of Criminal Procedure. Rule 3.191(g) applies only to the speedy trial issue in cases where there has been a mistrial, as there was in Weed. There was no mistrial in the instant case. To cite as precedent a case with facts inapposite to those in the instant case, and one with its holding based on a rule inapplicable to the instant case, is gross error.

The Petitioner argues, and the State agrees, that to be effective a waiver of speedy trial must be made within the applicable speedy trial period. As authority therefor, Petitioner cites Henshaw v. State, 390 So.2d 793 (Fla. 3d DCA 1980) and White v. State, 338 So.2d 256 (Fla. 4th DCA 1976.) However, the Petitioner has overlooked the rationale upon which the holdings in Henshaw and White are based, which, in fact support the State's position herein that the applicable speedy trial period was 180 days not 90. By citing Henshaw and White, the Petitioner

more clearly exposes the fatal flaw in his argument. Both cases make it quite clear that the issue of speedy trial is not determined by a retrospective view of the facts, as Petitioner urges this Court to take. Instead, Henshaw and White hold that the determination of speedy trial is made based on the facts evidenced at the moment in time that the first event that could terminate speedy trial occurs.

In White and Henshaw, counsel for the defendants had filed discovery demands after the speedy trial time periods had run. The State argued that the filing of such demands proved that the defendants had not been available for trial at the moment of the expiration of the speedy trial period and, thus, they had waived speedy trial. Both courts rejected that argument, based on the fact that at the moment the speedy trial period expired, there was no evidence that the defendants were involved in discovery. The defendants had filed their discovery demands after the last day of the speedy trial period. In reaching their decision, both courts recognized and relied upon the law set forth in Rubiera v. Dade County ex rel. Benitez, 305 So.2d 161 (Fla. 1974). That case provides that a defendant is not "continuously available" for trial if he is involved in discovery on the last day of the speedy trial period. But there was no evidence that either defendant in White or Henshaw was engaged in discovery at the moment the speedy trial period expired. As the Third District Court of Appeal stated:

> Since Henshaw's discovery efforts were not engaged in or pending at the expiration of the speedy trial period so as to evidence Henshaw's unavailability for trial at that moment, see Rutledge v. State, 374 So.2d 975 (Fla. 1979); Rubiera V. Dade County ex rel. Benitz, 305 So.2d 161 (Fla. 1974), the motion to compel did not divest him from his right to discharge. Henshaw, supra, at 795, (Emphasis added.)

Petitioner's argument in this case directly contradicts the law discussed above. Petitioner argues that in the instant case speedy trial expired on day 90. However, on day 90 Petitioner stood charged with the felony of grand theft, since he was alleged to have stolen sheets worth $150.00, and the applicable speedy trial period was 180 days. Additionally on day 157, when Petitioner waived speedy trial, Petitioner was still charged with grand theft and his waiver was made within the speedy trial period. Thus, under Henshaw and White, as well as Rubiera, and Rutledge v. State, 374 So.2d 975(Fla. 1979)., the waiver by Petitioner of speedy trial was effective because the facts as evidenced at that time showed that speedy trial did not expire on day 90 but rather on day 180 and, thus, the waiver on day 157 was valid.

The only thing that can be alleged to differentiate this case from the many others cited above by the Respondent as authority is that in this case the second information charged a misdemeanor rather than a felony as the first had done. However, under Florida case law cited, it is irrelevant whether the second information charges a crime of the same type as the first. The case law holds that a waiver of speedy trial which applies to the first information also applies to a second one based on the same criminal episode, without consideration of whether the second information charges a misdemeanor or felony.

Although there is not another appellate decision with the precise facts of this case (felony changed to misdemeanor), there are decisions on the other possible fact combinations (felony changed to felony, misdemeanor to felony, and misdemeanor to misdemeanor). All of these decisions hold that the speedy trial waiver on the first charge applies

to a second information relating to the same criminal episode. State v. Albanez and other cases cited on page 2. Furthermore, in State v. Godoy, supra, the defendant/appellee argued the speedy trial waiver did not apply when the first information charged robbery (first degree felony) and the second charged a lesser crime, accessory after the fact to the same robbery (second degree felony). The court rejected that argument, using as precedent Corlew, supra, where a greater degree of crime was charged on the second information. Thus, the case law attaches no significance to whether the second crime charged is of greater or lesser magnitude than the first. The focal point is whether the charge in the second information arose from the same criminal episode, not whether the second crime was one of the same legal magnitude as that charged in the first information.

Petitioner relies not only on inapplicable cases for his argument, but also upon an inapplicable rule, Rule 3.191(h)(2), Florida Rule of Criminal Procedure. As the First District Court stated in its opinion below:

> The purpose of Fla. R. Crim P. 3.191(h)(2) is to prevent the state from circumventing the speedy trial rule by nol prossing a charge prior to the expiration of the speedy trial period and then refiling a different charge based on the same criminal episode. It is not applicable under the facts of this case.

The State was not facing a speedy trial problem on the first information when it nolle prossed on January 17 and refiled on January 23. Instead, the State transfered the case to County Court because it was a more appropriate forum in which to try a case regarding the theft of bed sheets. Since the defense had waived speedy trial, the State believed

that waiver also applied to the second information, as was the precedent set forth in the cases with similar facts cited on page 2 herein. Thus, the abuse of power by the State that Rule 3.191(h)(2) was designed to prevent is totally absent in the instant case.

To apply Rule 3.191(h)(2) to the instant case is incorrect not only in the opinion of the First District but the Fourth District and the Fifth District Courts of Appeal as well. State v. Condon, 444 So.2d 73 Fla. 4th DCA 1984); State v. Kerper, 393 So.2d 77 (Fla. 5th DCA 1981). In Kerper, the defendant/appellee, charged with a felony, requested a continuance prior to the expiration of the 180 speedy trial period. Thereafter, the State nolle prossed the charge. It later refiled a new information charging the defendant/appellee with the same crime charged in the first information and based on the same facts. The defendant/appellee filed a motion for discharge, which the trial court granted. The District Court reversed the trial court stating:

> By moving for and obtaining a continuance appellee took this case out of the operation of the speedy trial rule and the time limitations of the rule are reactivated only by the denial of his motion for discharge or by his subsequent demand for speedy trial.... When appellee was granted a continuance the speedy trial rule, including the provisions of Florida Rule of Criminal Procedure 3.191(b)(2) [sic] relating to nolle prosequi, became inapplicable to his prosecution and remained inapplicable to the subsequent prosecution based on the same criminal conduct or episode. The trial court was in error in discharging appellee and the order of discharge is reversed and the case remanded for further proceedings. Id. at 78. (Emphasis added.)

Similarly, in State v. Condon, supra, the State filed a nolle prosequi more than a year after filing the misdemeanor information and after four defense continuances. The State refiled the information a

month after the nolle prosequi. The defendant filed a motion for discharge which was granted on speedy trial grounds. The Circuit Court acting in its appellate capacity affirmed, but the Fourth District Court disagreed, quashing the lower courts' orders and remanding for trial. The District Court held there had been no violation of defendant's speedy trial rights under the Florida Rules of Criminal Procedure, stating:

> [W]hen a defendant has by obtaining a continuance waived his speedy trial rights under Rule 3.191, Florida Rules of Criminal Procedure, and the information is nolle prossed, the wavier carries over and is effective under the refiled information. The speedy trial rule is subsequently brought back in to play only by denial of defendant's motion for discharge or by defendant's demand for speedy trial. In the instant case, neither of these had occurred. Nor can the state have violated rule 3.191(h) by nolle prossing, when the speedy trial rule was already waived. Id. at 74.

Thus, the precise argument that Petitioner makes, i.e., that Rule 3.191(h)(2) applies to this case, was considered and rejected by both the First District, the Fourth District and the Fifth District Courts of Appeal. Simlarly, it should be rejected by this Court.

In summary, Petitioner has taken two approaches in his attack on the District Court's ruling. First, Petioner has totally omitted mention of the overwhelming body of case law which addresses situations with fact sequences analogous to those in the instant case, i.e., first information/waiver of speedy trial/nolle prosequi/second information. The case law from every district court of Florida uniformly holds that a waiver of speedy trial on an initial information also applies to a second information when the charges arise from the same criminal episode. Second, Petitioner has argued as precedent cases based on fact situations which lack the crucial fact on which this case turns, i.e.,

the waiver of speedy trial. Along the same line, he has argued that Rule 3.191(h)(2) is applicable, whereas it has specifically been held by the Fourth and Fifth District Courts and the First District in its opinion below that the rule is not to be applied to a case when there has been a waiver of speedy trial. State v. Condon, supra, and State v. Kerper, supra.

V. CONCLUSION

This Honorable Court should answer the certified question in the negative and affirm the opinion of the First District Court of Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by hand delivery upon attorney for the Petitioner, LARRY BRYANT, Assistant Public Defender, Fourth Floor, Barnett Bank Building, Tallahassee, Florida the 27th day of August, 1985.

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