IN THE FLORIDA SUPREME COURT

RAYMOND STEWART,

Petitioner,

v. CASE NO. 67,315

STATE OF FLORIDA,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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IN THE FLORIDA SUPREME COURT

RAYMOND STEWART, Petitioner, v. STATE OF FLORIDA, Respondent.	:	CASE NO. 67,315

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This appeal arises from the First District Court of Appeal's denial of petitioner's petition for writ of certiorari. The district court certified the question presented on appeal to be one of great public importance.

Petitioner was the petitioner in the district court, appellee in the circuit court and defendant in the trial court, and will be referred to as petitioner in this brief. The record on appeal consists of petitioner's petition for writ of certiorari with appendices attached and will be referred to as "P", followed by the appropriate page number in parentheses. The state's response with appendices attached will be referred to as "R", followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

On June 13, 1983, an employee of Waterbed Delight contacted the Tallahassee Police Department about the theft of merchandise from his store (P A-2). The offense allegedly occurred on June 1, 1983 (P D-1). A warrant for Petitioner's arrest on the charge of grand theft was issued on June 13, 1983 (P D-1).

Petitioner was arraigned on an information charging grand theft in the Circuit Court on July 18, 1983 (P A-5; D-1). The initial information alleged an incorrect date and was amended to reflect the correct date (P D). (The amended information will be referred to herein as the first information). The trial date was originally set for September 30, 1983; however, on September 9, 1983, the Respondent requested and was granted a continuance (P A-5; D-1).

On December 2, 1983, the 157th day of the 180 day felony speedy trial period, Petitioner waived speedy trial by requesting a continuance (P A-5). Respondent then nolle prossed the grand theft charge, and refiled it in the County Court as a misdemeanor petit theft (P A-6; D-1).

On February 22, 1984, Petitioner filed a motion for discharge contending that, because he had not been brought to trial in either court within 90 days of his arrest, the speedy trial period had expired (P C). The County Court granted the motion (P D). Respondent then filed a timely notice of appeal (P E).

On appeal to the Circuit Court of the Second Judicial Circuit, Leon County, Florida, Respondent argued that the trial court erred in granting Petitioner's motion for discharge be-

cause Petitioner had waived his right to a speedy trial under the first information, and a "waiver of speedy trial on the first information applie[s] also to a second information based on the same criminal episode." (P H-8).

In response, Petitioner submitted that because the law provides that the focal point for speedy trial considerations is the date of the original arrest irrespective of subsequent changes in the charges, the trial court did not err in granting his motion for discharge (P I).

By opinion dated December 21, 1984, the Circuit Court reversed the trial court's order granting Petitioner's discharge (P F 1-3). Mandate was issued on January 8, 1985 (P G-1). On January 9, 1985, the County Court entered an order denying Petitioner's motion for discharge (P G-2).

On January 21, 1985, Petitioner filed a petition for writ of certiorari in the First District Court of Appeal (P 1-8). In an opinion filed June 7, 1985, the District Court upheld the decision of the circuit court. (A copy of the opinion is attached hereto as Appendix A). In approving the circuit court's decision, the district court certified the following question to be of great public importance:

> IF THE STATE FILED 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?

(Appendix A).

Petitioner filed a notice invoking the discretionary jurisdiction of the Supreme Court on July 8, 1985 (Appendix B).

III SUMMARY OF ARGUMENT

A motion for a continuance filed more than 90 days but less than 180 days after the defendant's arrest on felony charges does not constitute a waiver of speedy trial for misdemeanor charges when the state elects to nol prosse the felony charge and refile the charge as a misdemeanor.

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 issue before this Court is whether the felony or the misdemeanor speedy trial rule should apply to proceedings against a criminal defendant where the state files an information in the circuit court charging a felony and, prior to the expiration of 180 days but subsequent to the expiration of 90 days, the defense is granted a continuance followed by the state's nolle prosequi of the felony and later refiling of a misdemeanor based on the same criminal episode. As noted by the Circuit Court, the issue herein is one of first impression before Florida's appellate court below erred in holding he had waived his right to a speedy trial.

Rule 3.191(a)(1), Florida Rules of Criminal Procedure provides that :

> Except as otherwise provided by this Rule, and subject to the limitations imposed under (b)(1) and (b)(2), every person charged with crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged is 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 time-

> ly 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).

For purposes of this rule, a person is taken into custody "(i) when the person is arrested as a result of the conduct or criminal episode which gave rise to the crime charged, or (ii) when the person is served with notice to appear in lieu of physical arrest." Rule 3.191(a)(4), Florida Rules of Criminal Procedure. Accord, Swanson v. Love, 290 So.2d 112 (Fla. 2d DCA 1974).

The burden of complying with the speedy trial rule rests with the state. Gue v. State, 297 So.2d 135 (Fla. 2d DCA 1974). The time within which a person must be tried cannot be extended by the state entering a nolle prosequi to the crime charged and then prosecuting new or different charges based on the same conduct or criminal episode. Richardson v. State, 340 So.2d 1198, 1199 (Fla. 4th DCA 1976); State v. Rheinsmith, 362 So.2d 698 (Fla. 2d DCA 1978); State ex rel. Williams v. Cowart, 281 So.2d 527, 529 (Fla. 3d DCA 1973). Rather, Rule 3.191(h)(2), Florida Rule of Criminal Procedure, specifically provides that:

> The intent and effect of this Rule shall not be avoided by the State by entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode, or otherwise by prosecuting new and different charges based on the same conduct or criminal episode whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi.

Consequently, although earlier charges are dropped, the speedy trial time on charges later filed, but based on the same criminal

episode, is still measured from the date of arrest on the earlier charges. See State v. Thaddies, 364 So.2d 819 (Fla. 4th DCA 1978). Accord, Weed v. State, 411 So.2d 863 (Fla. 1982); State ex rel. Smith v. Nesbitt, 355 So.2d 202 (Fla. 3d DCA 1978); Clark v. State, 318 So.2d 513 (Fla. 4th DCA 1975).

The trial court in granting Petitioner's discharge, relied upon the language in Weed v. State, 411 So.2d 863 (Fla. 1982). In Weed, the defendants were arrested on August 18, 1977, and charged by information with separate counts of possession of marijuana and possession of hashish. After a jury trial which resulted in a mistrial, the state moved to amend the information to charge a felony. On February 10, 1978, the trial court allowed the amendment. The defendants then moved for and were granted discharge under the newly amended count on the basis of the speedy trial rule. The court reasoned that the amendment of the information to charge possession of more than five grams of a new and different charge based on the same conduct or criminal episode and was therefore subject to the 180 day time period in Rule 3.191(a)(1). The state then sought to amend the count to reinstate the misdemeanor. Finding that the original charge had been abandoned by the earlier amendment, and that the defendants were available for trial and no exceptional circumstances existed, the trial court rejected the amendment. On appeal by the state, the district court reversed. The court held that under the provisions of Rule 3.191(g), Rules of Criminal Procedure, the state was entitled to an enlarged period of 90 days from the date of the mistrial within which to retry the defendants.

The specific issue considered by the _Weed_ Court was whether the state should be given the benefit of the 90 days allowed by Rule 3.191(g) on the amended charge; however, the Florida Supreme Court in arriving at its holding, relied upon several decisions which are directly related to the issue at bar. Specifically, the Court observed that:

> In _Thaddies_, the court held that when a charge is dropped and another is filed based on the same incident, the date of the arrest is the relevant date for speedy trial purposes. In _Nesbitt_, the fact that the charge was changed from a felony to a misdemeanor and then back to a felony did not alter the running of the speedy trial period from the original arrest date. _See also Gue v. State_, 297 So.2d 135 (Fla. 2d DCA 1974). In _Cowart_, there was a mistrial after which charges were amended. After the expiration of the 90 days under Rule 3.191(g), the state attempted to nolle prosequi one charge. The court held the speedy trial time limit had run since the trial had not commenced within the 90 days. The court went on to add that the fact that the state entered a nolle prosequi did not operate to deprive the accused of his right to a speedy trial given the language in Rule 3.191(h)(2) which provides that the time cannot be executed by the filing of new charges based on the same criminal episode.

Weed, 411 So.2d at 865.

Consequently, the _Weed_ Court held that:

> These cases stand for a basic proposition that is central to this case, that it, the date of the original arrest is the focal point for speedy trial considerations, irrespective of changes made in charges. Only in specifically delineated circumstances can the time periods be adjusted.

_Id_.

Herein, in reversing the trial court's order, the circuit court observed that:

> It appears to have been established in Florida that "a waiver of speedy trial

on a first information applie[s] also to a second information on the same criminal episode." Conner v. State, 398 So.2d 983, 984 (Fla. 1st DCA 1981). Although the precise issue presented in this case has not previously been dealt with in any appellate decision cited by counsel or found by the Court, there are sufficient guidelines in the cases to be convincing that in this case, when the defendant moved for a continuance in the felony court on the grand theft charge, he had effectively waived the speedy trial provisions for any charge based on the same criminal episode as was involved in the first charge. The effect of such a continuance is most clearly expressed in Gallego v. Purdy, 415 So.2d 166 (Fla. 4th DCA 1982), which 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.

(P F 2-3). Further, the court held that the trial court's reliance on Rule 3.191(h)(2), Florida Rules of Criminal Procedure, "is misplaced", because this rule is "inapplicable where there has been a waiver of the speedy trial rule by action of the defendant before the entry of the nolle prosequi." (P F-3). Consequently, the court concluded that:

> When the defendant moved to continue the felony charge, he effectively waived the speedy trial rule and became estopped to assert it in another charge involving the same conduct or criminal episode as was involved in the felony charge.

(P F-3).

The First District Court, relying on Connor v. State, and Gallego v. State, 415 So.2d 166 (Fla. 4th DCA 1982), approved the Circuit Court's decision. In Connor and Gallego, the state

appears to have filed felony charges in the first information. Before the time for speedy trial had run, the defendants moved for a continuance. After the time for speedy trial had run, the state filed amended informations again charging a felony. Petitioner contends Connor and Gallego are inapplicable when the request for a continuance occurs subsequent to the expiration of the speedy trial period for the amended information as it did in the present case.

While it is true that a defense continuance constitutes a waiver of the right to a speedy trial, Petitioner submits that to be effective the waiver msut be made within the applicable speedy trial period. A waiver of speedy trial made after the period has expired is of no consequence. See, e.g., Henshaw v. State, 390 So.2d 793 (Fla. 3d DCA 1980)(Where the speedy trial time had expired prior to defendant's motion to compel discovery, the motion to compel discovery did not divest defendant of his right to discharge). Accord, White v. State, 338 So.2d 256 (Fla. 4th DCA 1976)(Where speedy trial period had elasped before any demands for discovery were made, defendant was denied speedy trial and was entitled to discharge as a matter of right).

Petitioner submits that the 90 day misdemeanor speedy trial rule should have been applied. The record clearly shows that Petitioner was arrested for grand theft on June 29, 1983. The grand theft charge was nolle prossed and refiled as a misdemeanor petit theft. Both charges originated from the same criminal episode. As noted by the Weed Court, the focal point for speedy trial considerations is the date of the original arrest irrespective of subsequent changes in the charges. Con-

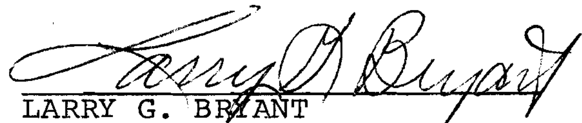
sequently, since Petitioner was not brought to trial within 90 days of his arrest, and did not waive his right to a speedy trial during that period, the trial court did not err in granting his discharge.

V CONCLUSION

Based upon the reasons and authorities set forth herein, Petitioner respectfully requests this Honorable Court to answer the certified in the affirmative and to order his immediate discharge.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Petitioner's Brief on the Merits has been furnished by hand to Assistant Attorney General Wallace Allbritton, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, Raymond Stewart, 715 Walnut, Slidell, Louisiana 70460 on this 29th day of July, 1985.

LARRY G. BRYANT