IN THE SUREME COURT OF THE
STATE OF FLORIDA

CASE NO.: 67,740

(5th DCA Case No. 84-695)

GEORGE GARCIA,

Petitioner,

VS.

STATE OF FLORIDA,

Respondant.
_____)

PETITIONER'S REPLY BRIEF ON THE MERITS

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I N D E X

CITATION OF AUTHORITY

(CASE CITED)

MEMORANDUM OF ARGUMENT AND LAW

1. SUMMARY OF ARGUMENT.

The Defendant GARCIA had a constitutional and procedural right to a speedy Trial. In Westlake v. Miner, this Court made clear that a Defendant's right to a speedy Trial takes precedence over the mere convenience to the State of trying him and his Co-Defendants together. Although under exceptional circumstances the Court has discretion to grant a continuance of a Trial there were no exceptional circumstance in this case merely because the Co-Defendants had sought a continuance. The Defendant demanded a speedy Trial and he had a right to a speedy Trial.

The Fifth DCA has forged a new and unique rule, "that a motion for discharge, for violation of speedy Trial rights, should be denied when the failure to hold Trial is attributable to a Co-defendant and the charge is conspiracy." Such a "rule" makes a sham of the Defendant's speedy Trial rights. This case is a perfect example. Just because other Defendants continued their Trial, that does not, and should not, eliminate the Defendant's right to a speedy Trial. Defendant GARCIA'S Trial was a year in coming. Evidence disappears, people's memories fade, and the Defendant remained in jail during that entire period without bond.

GARCIA'S Trial could have been had with GARCIA alone, without any prejudice, difficulty, or lack of ability by the Prosecution to present it's charges in this case. GARCIA arrived on the scene with cocaine in the presence of undercover narcotics

agents, and, the State had one of the co-conspirators who was present to testify for the State.

The State has cited cases which indicate that because of the nature of the crime of conspiracy generally a single Trial is necessitated in order to obtain a detailed mosaic of the whole undertaking. Well, since GARCIA'S entire participation in this case, took place on one night, in the presence of undercover officers, and in the presence of an alleged fellow conspirator, what else was needed? The normal problems facing a prosecutor in a conspiracy Trial were not present here.

The Defendant's right to a speedy Trial was flagrantly abused just so that the Prosecutor would have the convenience of trying all of the Defendants at once. There were no exceptional circumstances. If, in this case, the mere fact that Co-Defendants sought a continuance is considered to be an exceptional cirumstance, anything could be considered an exceptional circumstance, and Defendants' speedy Trial rights would no longer exist.

Other errors of constitutional or fundamental dimension occur in this case. The Defendant had a right to a fair Trial, to confront witnesses and to have proper instruction on the law. Credibility of witnesses is paramount in a Trial. If a Defendant is restricted from showing bias, prejudice, or possible motive for testimony, of a witness, then, the credibility of witnesses cannot be fairly and fully judged by the trier of fact. This Trial turned on the credibility of Parks and Lamaire the improper restriction in impeaching those witnesses violated GARCIA'S Fourth

Amendment right to a confrontation and a fair Trial. Despite case law holding that a witness may be questioned as to pending investigations, the Court prevented the defense from questioning a key prosecution witness as to a pending Grand Jury investigation of him. The reason for permiting cross-examination as to pending investigations is sound. The witness may well be testifying untruthfully in order to seek advantage or leniency in that pending investigation. This goes to the heart of that witness' credibility. There should not have been any restriction as to the defense developing such bias or prejudice of Agent Parks.

Furthermore, Defendant was deprived of his constitutional right to a fair Trial in this case when the Trial Court refused to give his requested jury instruction concerning the fact that no conspiracy exists when the other "co-conspirator" is a police officer who did not truly intend to participate in the conspiracy. Defendant was entitled to develop his defense and should have been given wide latitude in developing that defense, regardless of how improbable the Judge felt that the jury would accept that defense. In this case, an undercover agent took part in discussions, and feigned beng a co-conspirator to purchase cocaine, yet, the Trial Court refused to instruct the jury as to the law in such situations. The mere fact that there may have been other conspirators, besides the undercover agent, should not have precluded the requested instruction.

Moreover, there can be no fair Trial where the Court, through the use of jury instructions, cloaks a witness with an aura of credibility. A key witness for the State, Lamaire, was

testifying and assisting the State in the prosecution in order to obtain leniency. There is no standard instruction to the jury concerning witnesses which assist the State; yet the Court instructed the jury pursuant to section 893.235 as to the fact that that witness was assisting the State and that the Court believed the witness. That gave that witness credibility which he did not deserve and which prejudiced the Defendant's right to have a fair Trial. When the jury was instructed that a prosecution witness was assisting the State, it gave that witness unwarranted credibility. It clothed him with the appearance of being a "good guy", thus credible, because he was assisting the State according to the law as the jury was instructed. This wasn't warranted and this added condonation of credibility may have well impressed upon the jury that that witness was more credible than he would have been in the absence of such instruction. Again, the instruction emphasized that the only time the fifteen (15) year minimum mandatory requirement could be waived was on credible cooperation by the witness.

Finally, the Defendant had an absolute right to prepare for Trial. Although the defense is not entitled to the discovery of any evidence which is not actually in the possesion of the State, he is entitled to all evidence which they possessed. Here, the Defendant was precluded from obtaining access to transcripts of taped conversations which were in the possession of the Prosecutor. Although the Prosecutor argues that these were merely interpretations by his secretary, so is every transcript an

"interpretation". The burden upon the Prosecution in providing the transcripts of these tapes, already prepared, was minimal, whereas, the benefit to the Defendant would have been great. Balancing the interest, of the Defense's right to be prepared, and to pursue any theory of defense it may have, in order to assure a fair Trial, against the minor inconvenience to the State in providing copies of transcribed conversations, leads to but one conclusion, that they should have been provided to GARCIA.

It is a maxim of Constitutional Law, that any doubt as to whether or not a constitutional right has been infringed upon, should be resolved in favor of protecting that constitutional right. The constitutional violations here are gross. The Defendant's right to a speedy Trial was completely disregarded for the mere convenience of the State, Defendant was precluded from lawfully impeaching key witnesses, Lamaire was given a cloak of credibility which was not deserved, and the jury was not fully and properly instructed on the law. The Defendant's right to a speedy Trial can never be given back once lost. This case should be dismissed.

ARGUMENT, ISSUE I

IS THE CONVENIENCE OF THE STATE IN TRYING CO-DEFENDANTS TOGETHER SUFFICIENT REASON, IN AND OF ITSELF TO EXTEND AN OBJECTING DEFENDANT'S SPEEDY TRIAL TIME AND DENYING A MOTION TO SEVER WHEN A DELAY IS NECESSARY TO ACCOMODATE A CO-DEFENDANT IF THE DEFENDANTS ARE CHARGED WITH CONSPIRACY?

There must be sound reason for preventing the Defendant a speedy Trial. The speedy Trial rule mandates severance of Defendants to protect one Defendant's right to speedy Trial. Miner v. Westlake 478 So.2d 1066 (1985); Darby v. State, 463 So.2d 496 (1985); Rico v. State, 463 So.2d 1172 (1985); Ignizio v. Gersten, 483 So.2d 877 (1986)).

The Rico Court made clear the importance of the speedy Trial right and the burden upon the State in showing that there is a reason not to sever the cases, stating:

> "...that Defendant's right to a speedy Trial was paramount. As we have said, the State made no showing of a reason not to sever. (Citations omitted). See also State v. Littlefield, 457 So2d 558 (Fla. 4th DCA 1984), Where the Fourth District Court of Appeal pointed out that a Defendant makes a prima facia showing of his entitlement to a severance by showing that his speedy Trial rights would be violated if Co-Defendants motions for a continuance are granted. Thereupon,' it was the obligation of the State to respond by demonstrating that despite the speedy Trial consequences to Defendant there is reason not to sever the case.' See rule 3.191 (f)(5)." Id.

In this case, the Prosecution made no showing as to why an extension of the Defendant's speedy Trial rights should have been granted. The Prosecution contends that because this is a conspiracy case and it is sometimes difficult to get a mosaic view of the overall conspiracy when there are separate Trials that this is a justification for a severance. In this case that argument doesn't apply. Again, the Defendant's alleged participation in

this conspiracy took place all in one night. Defendant GARCIA delivered the cocaine in the presence of undercover officers and the presence of a member of the conspiracy who was testifying for the State. There would have been a complete showing of the Defendant's participation in the alleged conspiracy by evidence from that one night. The argument, under the facts of this case, that there would be difficulty in presenting the overall conspiracy if there was a severance, and separate Trials, is without merit. The prosecution has not met it's burden of establishing any exceptional circumstances for the extension of the Defendant's speedy Trial rights, and, in view of the Defendants demand for a speedy Trial, and objection to the continuance, which is set forth in the Judges order granting the continuance, this case should be dismissed.

The Court of Appeals bases it's decision that the State met it's burden of showing that the case should not be severed, "because of the conspiracy charges and the interest of justice would be best served by a joint Trial." This amounts to no more than convenience to the State. The bare allegation that there are conspiracy charges and that the interest of justice would best be served by a joint Trial is no more than words. We must look to the facts, not mere contentions. Just because some conspiracies may necessitate a single Trial in order to obtain a detailed mosaic of the whole undertaking, does not mean that that is true in every case, and, it isn't true in this case for the reasons stated above. The bare contention that there are conspiracy charges and the interest of justice would best be served by a

joint Trial is tantamount to making no showing. If this is all that is necessary to avoid a Defendant's speedy Trial rights then in every case the prosecution need only contend, where there is more than one Defendant, that these are conspiracy charges, and that the interests of justice will best be served. This would make a sham of a Defendants right to a speedy Trial and should not be permitted.

Miner v. Westlake requires "exceptional circumstances". In plain language "exceptional" means what it says. It is not exceptional to charge a Defendant with conspiracy. It is quite common place. And, it is not exceptional for one of those Defendants charged with conspiracy to demand a speedy Trial, while other Defendants seek continuances for various reasons. Again, that is quite common place. Accordingly, this Court must look beyond the sheer contention that there is a conspiracy and that the interest of justice would best be served by extending the Defendant's speedy Trial rights. The State has not met it's burden of establishing "exceptional circumstances" unless it establishes, with facts, not mere contention, 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 the rule requiring a speedy Trial. A review of Westlake makes this clear.

In Westlake the Florida Supreme Court set forth various "exceptional circumstances" (478 So.2d 1067). One of those was "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

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or otherwise, that it is unreasonable to expect adequate investigation and preparation within the periods of time established by this rule."(478 So.2d 1066) This requirement should be applied to cases involving conspiracy. Unless the case is so unusual and so complex that it would be unreasonable to expect adequate investigation and preparation by the State, the Defendants speedy Trial rights should be protected.

Here not only was there no showing that the case was unusual or complex so that the State could not reasonably be expected to be prepared, but on the contrary, the State was fully prepared to try the Defendant, but for the fact that the Co-Defendants sought a continuance. The mere charge of "conspiracy" does not necessarily make a case unusual or complex. There may be as few as two (2) Defendants in a conspiracy and the entire conspiracy could occur within a short period of time. Hypothetically, under the State's theory that the mere charge of "conspiracy" is sufficient to warrant waiver of speedy Trial rights, if, there were two (2) Defendants involved in a conspiracy which took place during a short period of time, say in one night, and one of the Defendants had an alibi defense, and his witness was unavailable for a period of several months due to severe illness, the remaining Defendant would be required to wait for his Trial even if the Prosecution had adequately investigated it's case and was prepared for Trial. Surely, so important of a right as that to a speedy Trial should not be trampled upon by the mere use of buzz words such as "conspiracy" and mere contention that the interest of justice would best be served by extension of those rights.

ARGUMENT, ISSUE II

WAS IT ERROR FOR THE TRIAL JUDGE TO REFUSE TO COMPEL THE STATE TO PROVIDE A DEFENDANT WITH COPIES OF VERBATUM TRANSCRIPTS OF CO-DEFENDANTS TAPE RECORDED CONVERSATIONS BEFORE TRIAL?

Rule 3.220(a)(1)(ii) imposes an obligation upon the Prosecutor to provide the defense with a "transcript" of any statement by any person known to the Prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto. Rule 3.220(a)(1)(viii) directs itself towards wire taps and provides an obligation for the prosecution to give the defense "any documents relating thereto." Rule 3.220 makes clear the prosecution's obligation to give transcripts of wire taps which were in the possesion of the prosecution to the defense. The fact that the defense may have had recordings of the wire taps is not sufficient. This can place too much of a burden upon the defense to transcribe the wire taps in order that the defense can properly, and easily, prepare for Trial. Since the prosecution already had copies of the transcripts, it would have imposed a minimal burden upon the prosecution to provide these transcripts to the defense. On the other hand, the benefit to the defense in having copies of the transcripts could have been great. It would have eased preparation for Trial, and would have lessened the burden upon the defense. Balancing the burden upon the prosecution in providing transcripts to the defense which it already had against the right of the defense to be totally prepared for Trial, there is no question but that the Court erred in refusing to order the prosecution to provide transcripts.

ARGUMENT, ISSUE III

WAS IT ERROR FOR THE JUDGE TO LIMIT DEFENDANT'S CROSS-EXAMINATION OF A LAW ENFORCEMENT OFFICER CONCERNING A PENDING CRIMINAL INVESTIGATION AGAINST THAT OFFICER?

The Defendant had a constitutional right to confront and cross-examine witnesses and to a fair Trial. As part and partial to the right to confront, the Defendant had a right to develop any bias, prejudice, or motive to lie, which would affect the jury's view as to the credibility of the witness. The Trial Court prevented the defense from cross-examining Agent Warren Parks of the Volusia County Narcotics Task Force concerning the fact that at the time of Trial, Parks was under actual or threatened criminal charges being investigated by the Volusia County Grand Jury. The Trial Court believed that the rule permitting such cross-examination did not apply to law enforcement officers because they would have nothing to gain(R-pg. 213, 214). This defies logic. Of course, it is of advantage to anyone not to have a criminal prosecution pursued. The cross examination of Agent Parks could have revealed that there was motive by him to lie, or distort the facts, so that the prosecution would have a stronger case, in order to obtain leniency in the criminal investigation pending concerning him. The mere fact that a key witness for the prosecution is a police officer does not do away with the normal human motivations which govern one's self interest and sense of survival. There is no logical reason why a police officer should not be subject to cross-examination as to pending criminal investigations against him. The credibility of witnesses in a Trial is that upon which the outcome of the Trial turns and it is

for the jury, considering all the facts and circumstances, to determine that credibility. When the defense was deprived of it's right to confront Agent Parks as to the pending criminal investigation against him the defense was also deprived of it's right to a fair Trial. Doubt should be resolved in favor of the protecting the Defendant's constitutional rights.

The right of full cross-examination is absolute, and the denial of that right is harmful and fatal error. (Porter v. State, 386 So.2d 1209(1980)). Liberal cross-examination should be permitted in order to demonstrate bias or prejudice on the part of a prosecution witness. (Lutherman v. State, 348 So.2d 624 (1977). (See also Alvarez v. State, 467 So.2d 455 (1985)).

ARGUMENT, ISSUE IV

WAS IT ERROR FOR THE TRIAL JUDGE TO INSTRUCT THE JURY THAT ANY PERSON COULD PROVIDE SUBSTANTIAL ASSISTANCE TO THE STATE AND RECEIVE A REDUCED OR SUSPENDED SENTENCE UNDER F.S. 893.135?

The jury was instructed under sub-part (3) of Florida Statute 893.135 providing that a sentence of a Defendant may be suspended or reduced if a person convicted of trafficking in drugs "provides substantial assistance in the identification, arrest, or conviction of any of his accomplices...". The jury was instructed, among other things, that the Judge hearing the motion may reduce or suspend the sentence " if he finds that the Defendant rendered such substantial assistance." In other words, the jury in this case was instructed that the Judge did find that Lamaire had rendered such substantial assistance. This was a comment on the credibility of Lamaire and invaded the province of the jury's obligation to determine that credibility.

There is no standard jury instruction pursuant to Florida Statute section 893.135(3). The Court acknowledged that in an ordinary case that instruction pursuant to section 893.135(3) should not be given (R-pg. 1001). The Court gave the instruction because a lot had been made out of the fact that the State was using section 893.135(3) with Lamaire (R-pg. 1001). The fact that the defense may make a good attack on the credibility of a State's key witness because he has received a reduced sentence for his testimony does not provide a justification for invading the province of the jury in determining that witness' credibility, and clothing that witness with an aura of credibility through the jury instruction that was given. Such instruction impeded the defense's right to confrontation in that it unduly mitigated that confrontation and thereby denied the Defendant a fair Trial by, in effect, telling the jury that witness was credible.

ARGUMENT, ISSUE V

DID THE TRIAL JUDGE ERR IN REFUSING TO INSTRUCT THE JURY THAT WHEN ONE OF TWO PERSONS WHO CONSPIRE TO COMMIT A CRIME IS AN UNDERCOVER POLICE OFFICER, THERE MUST BE PROOF THAT THE DEFENDANT ALSO CONPIRED WITH SOMEONE OTHER THAN THE POLICE OFFICER, TO PROVE CONSPIRACY?

A Defendant in a criminal case is entitled to a jury instruction on behalf of his defense if there is evidence in the record to support it , regardless of how weak or improbable it may be. The only proof of Defendant GARCIA'S participation in a conspiracy was his conversations with Agent Parks (R-Pg. 126-135). There was no other evidence that Defendant GARCIA was a part of the conspiracy. His name was never mentioned in any of the thirty three (33) taped recordings obtained in this case (R-pg. 143, 147,

269). And, there is no evidence of any contact with any of the co-conspirators until the final night of the alleged conspiracy when Defendant GARCIA met with Agent Parks (R-pg. 511).

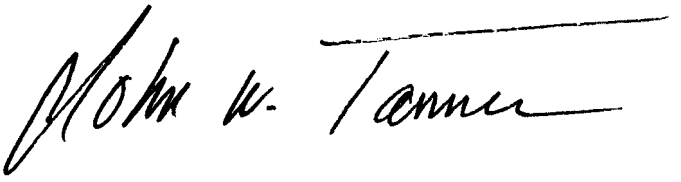
There is no conspiracy where an individual with whom a defendant allegedly conspires to traffic in drugs is a police officer, who was not really part of the conspiracy but was trying to catch drug purchasers. (O'Brian v. State, 454 So.2d 675 (1984)). The Defendant was entitled to have a jury instruction as to the law with respect to conspiring with a police officer. The jury would have no way of knowing that there would be no conspiracy if they found that GARCIA conspired only with Agent Parks. In fact, thay would assume that since they were not instructed otherwise, that there would be a conspiracy between GARCIA and Parks, even though Parks was police officer. This simply is not the law, and the jury should have been instructed accordingly.

2. CONCLUSION.

The case against against Defendant GARCIA should be dismissed on speedy Trial grounds since there was no proof by the State that "exceptional circumstances" existed to warrant extension of that right. And, even if there is a finding that there was no speedy Trial violation, the Trial conviction should be reversed as the Trial was fundamentally unfair due to restricted confrontation of witnesses, invasion of province of

the jury in determining the credibility of witness, and due to a failure of the Trial Court to fully and properly instruct the jury on the law of conspiracy.

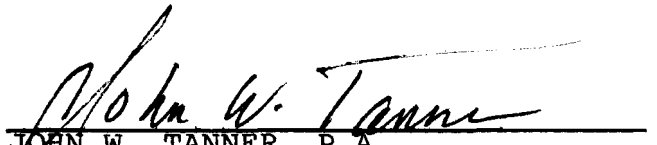
Respectfully submitted,



JOHN W. TANNER, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the HONORABLE KEVIN KITPATRICK CARSON, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Saytona Beach, Florida 32014, this 2nd day of June, A.D., 1986.



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