ORIGINAL

Supreme Court of Florida

STEVEN C. NAUGLE,

Petitioner,

vs.

Case No. 69,734

STATE OF FLORIDA,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF
THE FLORIDA SECOND DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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Petitioner, Pro Se.

Contents

PREFACE

The Petitioner will be refered to as Mr. Naugle and the Respondent is the State. The parties will be refered to as Mr. Naugle and the State.

Authorities

Other Authorities:

THE CASE AND FACTS

Mr. Naugle appeals his felony convictions and sentences following his plea of nolo contendere. The plea was accepted with a reservation of Mr. Naugle's right to appeal the Order denying his motion for discharge. (R. 149)

Om October 16,1984 a warrant for Mr. Naugle's arrest was issued on the complaint of the Pinellas Park, Florida, Police Department. The complaint alleged Mr. Naugle participated in the October 12, 1984 robbery of the Possum Valley Cafe in Pinellas Park. The warrant directed Mr. Naugle's arrest on six counts of armed robbery. (R. 1-6) On November 9,1984, the warrant and complaint were amended to allege three counts of armed robbery and five counts of kidnapping, all steming from the Possum Valley Cafe robbery. (R. 9, 13, 16)

Mr. Naugle was arrested pursuant to the warrant on November 17, 1984, in Frankenmuth, Michigan. (R. 145, 208) The arrest was for the Florida charges only; no charges were filed on Mr. Naugle in Michigan. (R. 208)

Mr. Naugle was returned voluntarily to Pinellas County on January 4, 1985, where he was held in Pinellas County Jail in lieu of $100,000 bond. (R. 7-8, 211)

No information was filed against Mr. Naugle during the next three months. On March 5, 1985, his trial counsel filed a formal demand for an adversary preliminary hearing. (R. 27) The hearing was held March 18, 1985. (R. 68)

On March 30, 1985, the State filed an information charging Mr. Naugle with the same counts that had been alleged in the November 9, 1984 amended complaint and warrant. (R. 30) Mr. Naugle pleaded not guilty, demanded discovery, and demanded a jury trial. (R. 33)

Mr. Naugle moved for discharge under Fla. R. Crim. P. 3.191 on June 3, 1985. He asserted that the speedy trial period had expired on May 16, 1985, 180 days after the Michigan Authorities arrested him on the Florida warrant. (R. 134)

The motion was heard June 7, 1985 by a judge other than the one who had presided at the preliminary hearing. On the motion to discharge the State presented only the testimony of Winefred Subatch, a secretary assigned to the extradition desk of the State Attorney's Office. (R. 201-202) She identified two Telex messages. The first, dated November 26, 1984, was from "Kathy Lindsay, Fugitive Squad, Pinellas Co. S.O., Fla" to the chief of the Frankenmuth, Michigan Police Department. It read:

> THE ABOVE SUBJ [MR. NAUGLE] WAS ARRESTED ON OUR FUGITIVE CHARGE ON 11-17-84. ON 11-19-84 YOU ADVISED SUBJ WANTED TO TALK TO AN ATTORNEY BEFORE DECIDING WHETHER OR NOT HE WOULD SIGN WAIVER. PLEASE ADVISE A-S-A-P DID SUBJ WAIVE OR DO WE NEED TO START OR EXTRADITION PAPERWORK.

The second Telex appeared to be a reply to the first, dated the same day:

> REF; STEVEN CAROL NAUGLE WM 11-20-58 WAS ARRAIGNED ON 11-20-84, BOND SET AT $500,000.00 AND DID NOT WAIVE EXTRADITION.

(R.145)

Mr. Naugle's counsel asserted a hearsay objection to the admission of the Telexes into evidence. (R. 204-205)

MR. RICE: Your Honor, I would object to the State's exhibit Number "1" in that it is a statement of -- Purports to be a statement of fact that the defendant did not waive extradition. That's a fact that is in issue, and I think the Defendant's here to testify. *** It's hearsay.

THE COURT: Well, let me ask this: The Court doesn't understand it being introduced to prove that particular fact. But is it?

MR. ZINOBER: It will be, your Honor. However, the fact in issue, certainly Mr. Rice plans to rebut.

* * *

MR. ZINOBER: Your Honor, what I'm doing is -- I do not believe that the rules of evidence apply to this hearing. The speedy trial rules --

THE COURT: Objection overruled. Be received.

(R. 205)

Ms. Subatch also identified a form memorandum she had prepared, "TO WORD PROCESSING FROM: EXTRADITION SECRETARY", dated December 13, 1984. (R. 146, 203) It was the worksheet whereby she would have instructed the State Attorney's word processing department to prepare the necessary request for a governor's warrant for Mr. Naugle's extradition from Michigan. (R. 204)

At the bottom of the worksheet she had written "12-21-84 D. Signed Waiver". (R. 146, 204) She made the notation on that date, she said, after receiving a telephone call from the Sheriff's Office "saying they got the Telex that the Defendant had waived." (R.204) The worksheet was admitted into evidence. (R. 204-205)

After Ms. Subatch's testimony the State rested. (R. 207)

Mr. Naugle then testified that he was placed in jail after his November 17, 1984 arrest by Michigan authorities. (R. 208-209) Two days later a jail guard told him the chief of police wanted to know if he was willing to "sign extradition." (R. 209) "I said, 'yes, sir, I am; but I'd like to speak to counsel first.'" (R. 209)

Q. You are willing to sign?

A. Yes, sir.

Q. But you told them you wanted to see counsel first?

A. Yes, sir.

Q. What did he do then?

A. He just told me that he would relay the message to the chief.

(R. 209-210)

Mr. Naugle testified that he was taken to court the next morning "and they appointed me a counsel and told he would be out to see me within a reasonable time and talk to me about the extradition." (R. 210) Three weeks passed before Mr. Naugle's appointed attorney first visited him. (R. 210)

Q. When he came to see you three weeks later, what happened?

A. He -- We had a talk about the extradition; and I told him that I was willing to waive. And he said that he would set a court date.

(R. 210)

The hearing was held on December 19, 1984, Mr. Naugle said, at which time he executed a written waiver of extradition. (R. 211)

On argument on the motion the State contended that Mr.

Naugle had lost his speedy trial rights by failing to waive extradition immediately, that in any event the speedy trial period did not commence until Mr. Naugle's return to Florida on January 4, 1985, and that the January 1, 1985 amendment to Fla.R. Crim. P. 3.191 applied to Mr. Naugle's case, thereby permitting the State to bring Mr. Naugle to trial within ten days after the hearing. (R. 216) Mr. Naugle's counsel disputed all of these arguments. (R. 137, 233) The Court orally announced its ruling as follows:

> Court finds that the defendant, Naugle, according to his own testimony, which is not contraried, expressed a willingness immediately after his arrest to be extradited. However, he declined to execute the necessary waiver of extradition for almost a month.
>
> The Court understands his right to his lawyer before he did this. However, the decision to extradite or not waive was his, and he is bound by his failure to do so..
>
> The Court therefore finds that his failure to be returned was through his own fault and not the fault of the State of Florida, and the 180 days did not run until he was available for trial here. The Court further finds, which, we'll presume we're going to have this taken up, the Court finds the speedy trial rule as amended on January 1, 1985, does apply, that the present rule applies to all cases as to all defendants pending at the time of its amendment, that the State had 15 days from the day of request for discharge. Motion to discharge is denied.
>
> (R. 234-235)

On June 11, 1985, Mr.Naugle changed his plea to nolo contendere, reserving the right to appeal the denial of his motion for discharge.

Mr. Naugle was adjudicated guilty on November 15, 1985, and sentenced to eight 20-year terms of incarceration, to be served concurrently. (R. 180-190)

This appeal was commenced December 12, 1985. (R. 195) On October 10, 1986 the Second District Court of Appeal certified

this question to our Supreme Court:

> DOES FLORIDA RULE OF CRIMINAL PROCEDURE 3.191(b)(1) APPLY TO PERSONS HELD IN OTHER JURISDICTIONS SOLELY ON THE BASIS OF CHARGES PENDING IN THIS STATE?

On October 16, 1986 this Court answered the question in State v. Bivona, 11FLW 527, 1986.

On October 23, 1986 Mr. Naugle filed for a rehearing. On November 12, 1986, rehearing was denied.

On December 3, 1986 Mr. Naugle filed a notice of appeal in the Second District Court of Appeal.

On December 10, 1986 Mr. Naugle filed a notice to invoke discretionary review.

On February 2, 1987 the Florida Supreme Court sent Mr. Naugle the briefing schedule for the case herein.

SUMMARY OF ARGUMENT

Mr. Naugle's speedy trial rights were governed by rule 3.191 as it existed prior to its January 1, 1975 amendment. State v. Green, infra. Those rights commenced upon his arrest by Michigan authorities on November 17, 1984. Id. Those rights were not effected by the exclusional provisions of rule 3.191's subsection (b)(1); the subsection was inapplicable because Mr. Naugle was arrested solely on a Florida warrant and during his detention in Michigan he was not charged by an indictment or information, Hawkins v. State, infra.

The State bore the burden of bringing Mr. Naugle to trial within 180 days of his arrest, i.e., May 15, 1985. During that period, Mr. Naugle never failed to attend a required court appearance, and never announced that he was not ready to proceed with a scheduled trial.

The State's failure to furnish Mr. Naugle a timely trial was not excused by a written order of the court extending the speedy trial period for any reason. Nor was it occassioned by any conduct of Mr. Naugle. When first asked Mr. Naugle announced his willingness to waive extradition, and when first given the opportunity he did so. Mr. Naugle's rightful request to see an attorney had no effect whatever on the orderly prosecution of the charges against him, which were not filed for nearly four months after his arrest by Michigan authorities.

The question here is whether the rule's paragraph (b)(1) was applicable to Mr. Naugle so as to deprive him of the benefits

of the rule. Mr. Naugle would assert that the rule should have no effect to his particular instance for the clear and unambiguous language of rule 3.191(b)(1) specificly states that a accused must be charged with a crime by an indictment or information issued or filed under the laws of this State[.] In State v. Bivona, infra, this Court said 'the language of (b)(1) is without ambiguity. [O]ne who is 'incarcerated' [outside Florida], and who is charged with a crime by an indictment or information issued or filed under the laws of this State, is not entitled to the benefits of this Rule until that person returns or is returned to the jurisdiction of the court which the Florida charge is pending and until written notice of this fact is filed with the Court and serverd upon the prosecutor. (emphasis added.)

The first district's Hawkins decision, which adopts a strict construction of the language of paragraph (b)(1), wholly ignores the other reason Mr. Naugle's speedy trial rights were not affected by the paragraph: during Mr. Naugle's incarceration in Michigan, he was not "charged by an indictment or information issued or filed under the laws of this State[.]" No strict construction of the rule could ignore that language, which clearly excludes Mr. Naugle from its operation.

Argument

DEFENDANTS WHO ARE ARRESTED AND DETAINED IN FOREIGN JURISDICTIONS SOLELY ON FLORIDA CHARGES, BUT WHO ARE NOT CHARGED WITH A CRIME IN FLORIDA BY INDICTMENT OR INFORMATION, ARE NOT EXCLUDED FROM THE BENEFITS OF FLORIDA'S SPEEDY TRIAL RULE UNDER RULE 3.191(b)(1).

As Mr. Naugle's case was being briefed in the District Court of Appeal, this Court was considering the conflict between the First and Fourth Districts as to whether prisoners detained in foreign jurisdictions solely on Florida charges were subject to the exclusional provisions of Fla.R.Crim.P. 3.181(b)(1), which provides:

> (b)(1). Prisoners Outside Jurisdiction. A person who is in federal custody or incarcerated in a jail or correctional institution outside the jurisdiction of this Stte or a subdivision thereof, and who is charged with a crime by indictment or information issued or filed under the laws of this State, is not entitled to the benefirt of this Rule until that person eturns or is returned to the jurisdiction of the court within which the Florida charge is pending and until written notice of this fact is filed with the court and served upon the prosecutor.

Citing the danger that the State could otherwise allow a defendant to languish in a foreign jail, the Fourth District had held in State v. Bivona, 460 So.2d 469 (Fla. 4th DCA 1984), that subsection (b)(1) did not refer to defendants arrested in another state solely on Florida charges. In so ruling, the Bivona Court had expressly disagreed with the majority opinion in Hawkins v. State, 451 So.2d 903 (Fla. 1st DCA 1984).

In Hawkins, the First District had espoused a strict construction of subsection (b)(1) so as to hold it applicable to any person held in a federal or out-of-state jail, regardless of the reason for that incarceration.

This Court accepted jurisdiction to review Bivona based on

its conflict with Hawkins. Though at the time the court below decided Mr.Naugle's case this Court had yet to rule on the issue, Mr. Naugle urged the District Court to consider his case in light both Hawkins and Bivona. The reason: even the strict constructionist rationale of Hawkins, subsection (b)(1) was inapplicable to Mr. Naugle because he was not charged by indictment or information at any time during his foreign incarceration.

In its opinion affirming Mr. Naugle's conviction, the court below asserted that "the better construction is that adopted in Hawkins." Nevertheless, because this Court had yet to rule on the issue, the court certified the question posed by he conflict between Hawkins and Bivona.

Six days later, this Court reversed the Bivona decision, and held that subsection (b)(1) indeed applies to prisoners in foreign jurisdictions even if they are held solely on Florida charges.

But, particularly in light of the rationale upon which it was based, this Court's decision in Bivona does not support the exclusion of Mr. Naugle from the benefits of the speedy trial rule.

In Bivona the Court emphasized that "[t]he language of (b)(1) is without ambiguity. . . ."

> The word 'incarcerated' in the rule is unqualified, not restricted in meaning to confinement upon conviction or to confinement for charges in the jurisdiction in which the confinement occurs. Clearer language than this is difficult to envisage. Yet the lower court puts a gloss on it, unwarranted by anything that appears in rule 3.191, by reading into subsection (b)(1) that incarceration outside Florida be on charges pending in the other state before (b)(1) comes into play.

Also without ambiguity is the other requisite that subsection (b)(1), by its terms, prescribes for its applicability, That is, that the prisoner be "charged with a crime by indictment or information issued or filed under the laws of this State[.]"

Certainly, under the Bivona rationale, subsection (b)(1) did not apply to Mr. Naugle, because the State did not see fit to file an information against Mr. Naugle until March 30, 1985--nearly three months after his return to Florida, and approximately four and one-half months after his arrest.

This fact is important not simply because Mr. Naugle did not fall within the strict language of the rule, but also because it had a substantive effect on his rights. This is particularly so when it is remembered that Mr. Naugle agreed to waive the formalities of extradition when requested to do so by the Michigan authorities and, when first given the opportunity, executed a formal written waiver.

In Bivona this Court observed that a person held in a foreign jurisdiction on Florida charges would still have his right, under the Uniform Criminal Extradition Act, to seek his release if the requesting state was dilatory in obtaining his return. The Court cited Florida's section 941.17, Florida Statutes. It reads as follows:

> If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in s. 941.16, but within a period not to exceed 60 days afte the date of such new bond.

The governor's warrant is provided for in s. 941.07. Note that the fugitive's waiver under s. 941.06 waives the requirement of a governor's warrant under s. 941.07.

As this Court observed in Bivona, the provisions of s. 941.17 might not be a hollow protection in the case of a fugitive who resists extradition, as in Hawkins. But it is of no use to someone such as Mr. Naugle, who sought to hasten the disposition of the charges against him by affirmatively waiving the formal extradition requirements upon which release under s. 941.17 are predicated. For Mr. Naugle, s. 941.17 is not a "hollow protection" against the State's dilatoriness; it was no protection at all.

Vis-a-vis the Bivona holding itself, it is significant that subsection (b)(1) does not refer to s. 941.17, but does make specific reference to ss. 941.45-941.50, which set forth Florida's codification of the Interstate Agreement on Detainers. Had Mr. Naugle been serving a sentence for a conviction in Michigan, and Florida had sought him by filing a detainer, Mr. Naugle could have made a request for final disposition under s. 941.45(3)(a) and thereby required the State to bring him to trial within 180 days.

Subsection (b)(1)'s reference to rights under the detainer statutes is a recognition that persons serving sentences in foreign jurisdictions have speedy trial rights already, and should not be permitted to take advantage of Florida's speedy trial rule. Otherwise, such persons would have the ability to shortchange the State of its full 180-day statutory speedy trial period by making a demand for speedy trial under Rule 3.191(a)(2).

It thus makes sense that persons who have rights under the detainer statutes should be excluded from the benefits of Rule 3.191. But if subsection (b)(1) is construed to exclude all prisoners in foreign jurisdictions, such creates an anomalous, counterproductive and unjust result:

Persons of proven criminality who are serving sentences for crimes committed in other states have speedy trial protection; persons who seek to avoid answering to charges by actively resisting extradition have speedy trial protection; but persons who take affirmative steps to hasten their return to face the charges against them have none.

Conclusion

Mr. Naugle respectfully submits that for the reasons discussed herein, the Court's decision in Bivona was incorrect, overbroad, or inapplicable to him in any event. He therefore respectfully requests the Court to reverse the decision under review, and to remand to the trial court with instructions that he be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Candance M. Sunderland, Assistant Attorney General, Suite 804, 1313 Tampa Street, Tampa, Florida 33602 this 24 day of February, 1987.

By: _____
Steven C. Naugle, Pro se.

SWORN

I DO HEREBY SWEAR that the contents of the foregoing is true and correct.

_____
Steven Naugle

STATE OF FLORIDA]
] ss.
COUNTY OF PASCO]

SWORN TO AND SUBSCRIBED before me in the aforesaid County and State this 24th day of February, 1987.

_____
Notary Public, State Of Florida

Notary Public, State of Florida
My Commission Expires Feb. 21, 1988
Bonded Thru Troy Fain - Insurance, Inc.