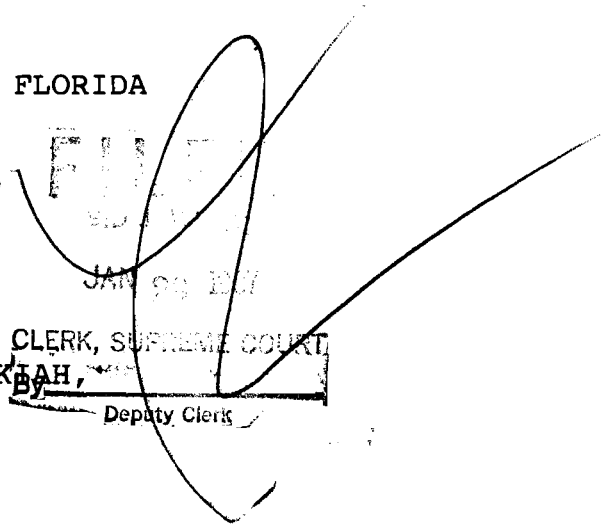
IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,765



MICHAEL ANTHONY HEZEKIAH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

KAREN M. GOTTLIEB
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

OTHER AUTHORITIES

FLORIDA STATUTES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,765

MICHAEL ANTHONY HEZEKIAH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

INTRODUCTION

Petitioner, Michael Anthony Hezekiah, was the appellee in the District Court of Appeal of Florida, Third District, and the defendant in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. Respondent, the State of Florida, was the appellant in the District Court and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they stand before this Court.

The symbol "T." will be utilized to designate the transcript of the proceedings in the trial court and the symbol "R." will be utilized to designate documents in the record on appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On October 1, 1984, petitioner was arrested for the offenses of trafficking in cocaine, possession of cocaine, and resisting arrest without violence. (R. 4-5, 15, 26; T. 6-7). On October 16, 1984, the prosecution announced a "no action" of the case and the petitioner was discharged. (R. 15, 26; T. 7).

On December 11, 1984, an information was filed in which the petitioner was charged with the offenses for which he had previously been arrested. (R. 1-3a, 15, 26-27; T. 8). An arrest warrant was issued on the same date. (R. 10-13; T. 6). Petitioner was never notified to appear in court (T. 8), and the warrant remained unexecuted until petitioner was arrested on November 13, 1985. (R. 14, 15, 27; T. 8).

On November 26, 1985, petitioner filed a motion for discharge under the speedy trial rule. (R. 15). Petitioner contended that the 180-day speedy trial period had expired on March 30, 1985. (R. 15).

At the hearing on the motion for discharge, counsel for petitioner argued that, if the state were provided the "ten-day window" of the 1985 speedy trial rule, then defendants arrested prior to 1985, whose cases were previously "no actioned", could be tried years later. (T. 8). The trial court granted the motion for discharge. (T. 8-9).

An order granting the motion for discharge was filed on February 21, 1986. (R. 26-29). That order provides, in part:

> 11. Moreover, even if the amendment to the speedy trial period were to be generally construed to govern those taken into custody during 1984 and whose 180-day speedy trial

period expired in 1985, this court would not apply this general rule to the particular facts of this case due to the unique prejudice that would be suffered by this defendant. While the effect on the typical defendant arrested in 1984 would be an additional 10-day notice period for the State, this defendant would be far more drastically affected by the amendment.

12. After the defendant's case was "no-actioned" in 1984, the State failed to arrest him on the new but identical charges for more than one year. This re-arrest came in excess of six months after the 180-day speedy trial period had elapsed. Thus, for all the defendant knew, the charges against him had lapsed some six months previously. The State's argument before this court, if accepted, would mean essentially that by virtue of "no-actioning" the State would have obtained a speedy trial extension period in excess of six months.

This was clearly not the purpose of the 10-day notice provision and such an application of the rule would violate the spirit of Subsection (h)(2), which provides:

> 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.

(R. 26-29).

Respondent filed a notice of appeal on February 21, 1986. (R. 30). On December 2, 1986, the District Court reversed the order of the lower court, and certified the following question to be of great public importance:

> Whether Fla.R.Crim.P. 3.191(i)(4) is applicable to a criminal case wherein the defendant is taken into custody prior to

> January 1, 1985, 12:01 A.M., the effective date of the above-stated rule.

(R. 32).

On December 12, 1986, petitioner filed a notice to invoke the discretionary jurisdiction of this Court and a motion to stay the mandate of the District Court. On December 22, 1986, the District Court stayed issuance of the mandate pending the discretionary review proceeding in this Court.

QUESTION PRESENTED

WHETHER THE 1985 AMENDMENT TO THE SPEEDY TRIAL RULE SHOULD NOT GOVERN THE DEFENDANT WHO WAS TAKEN INTO CUSTODY AND WHOSE CASE WAS "NO ACTIONED" BY THE STATE IN 1984, WHERE APPLICATION OF THE 1985 REMEDY PROVISION WOULD GRANT THE STATE AN AUTOMATIC EIGHT-MONTH EXTENSION OF THE SPEEDY TRIAL PERIOD, RATHER THAN THE TEN-DAY GRACE PERIOD CONTEMPLATED BY THE RULE.

SUMMARY OF ARGUMENT

The 1985 remedy provision of the speedy trial rule should not govern a defendant taken into custody in 1984, where the state announces a "no action" of the case in 1984 and later seeks to reactivate the time period with the arrest of the defendant long after the expiration of the 180-day speedy trial period. The defendant was never on notice that a motion for discharge could have been filed 175 days after his arrest, and at that point in time, no charges were pending in court against him.

The intent of the 1985 remedy provision was to afford the state 15 days within which to try a defendant afer the filing of the motion for discharge so as to obviate the perceived abuse of

automatic discharge. This goal is not fostered by permitting the state to secure, through the "no action" device, an eight-month extension of the speedy trial period.

The trial court correctly found that the eight-month extension which the state would fortuitously obtain if the "ten-day window" provision of Fla.R.Crim.P. 3.191(i)(4) were applied in this case would contravene the intent of the rule. The District Court's application of the 1985 amendment on these facts should be disapproved.

ARGUMENT

THE 1985 AMENDMENT TO THE SPEEDY TRIAL RULE SHOULD NOT GOVERN THE DEFENDANT WHO WAS TAKEN INTO CUSTODY AND WHOSE CASE WAS "NO ACTIONED" BY THE STATE IN 1984, WHERE APPLICATION OF THE 1985 REMEDY PROVISION WOULD GRANT THE STATE AN AUTOMATIC EIGHT-MONTH EXTENSION OF THE SPEEDY TRIAL PERIOD, RATHER THAN THE TEN-DAY GRACE PERIOD CONTEMPLATED BY THE RULE.

This case presents the question of the scope of the holding of the Court in Bloom v. McKnight, Case No. 68,401 (Fla. Jan. 5, 1987). In that case, this Court held that a motion for discharge is the operative event which determines whether the 1985 revision of the speedy trial rule controls. This holding resulted in the application of the 1985 amendment to an individual taken into custody prior to January 1, 1985, the effective date of the amendment, but whose discharge motion was filed subsequent thereto.

The case at bar presents the question whether the same holding applies when the state, by virtue of a "no action", followed by a subsequent reactivation of the case and arrest of

the defendant, can extend the speedy trial period months after it otherwise would have expired. The factual scenario in this case evidences the gross abuse to which the broad rule of Bloom v. McKnight is subject, and underscores the necessity for a limitation of that holding.

After petitioner was taken into custody on October 1, 1984, the state announced a "no action" of the case and petitioner was released. (R. 4-5, 15, 26; T. 6-8). At this point, petitioner was effectively freed of the charges. Datema v. Barad, 372 So.2d 193, 194 (Fla. 3d DCA 1979); State ex rel. Smith v. Nesbitt, 355 So.2d 202, 204-06 (Fla. 3d DCA 1978).

Long after the expiration of the 180-day speedy trial period, indeed more than one year after petitioner's initial arrest, petitioner was re-arrested for the identical charges. (R. 14, 27-28; T. 8). The state never disputed the lengthy time which had expired or that petitioner had never been noticed to appear in court during the interim thirteen months. (T. 8). Rather, the state argued its entitlement nonetheless to an extra "ten day window under the amended law of January 1st, 1985." (T. 8).

This Court, in Bloom v. McKnight, has recognized that the purpose of the additional days afforded the state following the filing of a motion for discharge under the 1985 scheme is "to obviate the perceived abuse of immediate discharge" and to provide the state "an opportunity then to try him." (Slip opinion at 2)(quoting Zabrani v. Cowart, Case No. 86-910 (Fla. 3d DCA Nov. 25, 1986))(citation omitted). But application of the

1985 rule to a defendant such as petitioner would lead to a far different, far more onerous, result. As the trial court explained,

> While the effect on the typical defendant arrested in 1984 would be an additional 10-day notice period for the State, this defendant would be far more drastically affected by the amendment. . . . The state's argument . . . would mean essentially that by virtue of 'no-actioning' the State would have obtained a speedy trial extension period in excess of six months.

(R. 28-29).

The Committee Note to the speedy trial amendment evidences that the eight-month fortuity awarded the state by applying the 1985 amendment runs contrary to the intent of the amendment. Indeed, the fifteen day period was chosen only to permit the state to remedy a mistake, not to eviscerate the time constraints:

> The total 15 day period was chosen carefully by the committee, the consensus being that the period was long enough that the system could, in fact, bring to trial a defendant not yet tried, but short enough that the pressure to try defendants within the prescribed time period would remain. In other words, it gives the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints. It was felt that a period of 10 days was too short, giving the system insufficient time in which to bring a defendant to trial; the period of 30 days was too long, removing incentive to maintain strict docket control in order to remain within the prescribed time periods.

Committee Note, Fla.R.Crim.P. 3.191 (1984), 33 F.S.A. Rule 3.191 at 191 (West Supp. 1986).

Petitioner can hardly be faulted for not having filed his motion for discharge after the expiration of the initial 175-day

period, as authorized by the 1985 rule. Florida precedent was to the effect that the 1985 amendment would not control his case. See State v. Jenkins, 389 So.2d 971, 975 (Fla. 1980); Tucker v. State, 357 So.2d 719, 721 n.9 (Fla. 1978); State v. Williams, 350 So.2d 81, 83 (Fla. 1977); State v. Boatman, 329 So.2d 309, 311-12 (Fla. 1976); State v. Green, 773 So.2d 823 (Fla. 2d DCA 1985); Arnold v. State, 429 So.2d 819, 820 (Fla. 2d DCA 1983); Fulk v. State, 417 So.2d 1121, 1123 n.1 (Fla. 5th DCA 1982); Hood v. State, 415 So.2d 133, 134 n.4 (Fla. 5th DCA 1982); State v. Freeman, 412 So.2d 452, 453 n.2 (Fla. 5th DCA 1982); Holmes v. Leffler, 411 So.2d 889, 891 (Fla. 5th DCA 1982), review denied, 419 So.2d 1200 (Fla. 1982); Jackson v. Green, 402 So.2d 553, 554 (Fla. 1st DCA 1981). And no charges were pending against him at that time, and no court was assigned with jurisdiction of his case. Yet, the ramification of the District Court holding is that, by petitioner's failure to have taken this action which he had no reason to take, he effectively waived his right to a speedy trial guaranteed by the Florida rule, and Section 918.015, Florida Statutes (1983). Cf. Stuart v. State, 360 So.2d 406, 411 (Fla. 1978)("silence is not enough to show waiver by acquiescence [of speedy trial rule], but some kind of positive acceptance is required").

Moreover, the trial judge correctly found that permitting the state the additional fifteen days of the 1985 speedy trial remedy provision "would violate the spirit of Subsection (h)(2)" of the rule. (R. 29). That subsection provides:

> 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.

The basic precepts of this provision should preclude the state, by virtue of the "no action" of the case and subsequent refiling, from circumventing the true intent of the remedy provision. See also State v. Rheinsmith, 362 So.2d 698, 698-99 (Fla. 2d DCA 1978); Richardson v. State, 340 So.2d 1198, 1199 (Fla. 4th DCA 1976).

Extensions of the speedy trial period have heretofore required authorization by the court and a showing of exceptional circumstances. Fla.R.Crim.P. 3.191(f); Stuart v. State, 360 So.2d at 412-13. The eight-month extension herein obtained by the state runs contrary to this established procedure and, to quote the trial judge, "was clearly not the purpose of the 10-day notice provision" (R. 29).

In the final analysis, the decision of the District Court, if allowed to stand, threatens to undermine the integrity of the speedy trial rule by substituting confusion where simplicity and clarity had been. On the facts presented in this case, the order of the trial court must be upheld.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court quash the decision of the District Court of Appeal of Florida, Third District.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to RALPH BARREIRA, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128 this 15th day of January, 1987.

Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender