IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,765

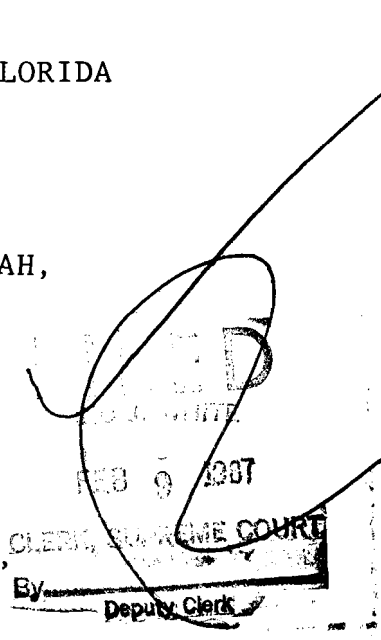
MICHAEL ANTHONY HEZEKIAH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



ON DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner was the appellee in the Third District Court of Appeal and the defendant in the trial court, and Respondent was the appellant in the District Court and the prosecution in the trial court. The parties will be referred to as they stand before this Court.

The symbol "R" will refer to the record on appeal and "T" to the separately bound transcript of proceeding. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts contained in Petitioner's brief as accurate.

QUESTION PRESENTED

WHETHER THE 1985 AMENDMENT TO THE SPEEDY TRIAL RULE CONTAINS OR CONTEMPLATES AN EXEMPTION FOR DEFENDANTS WHOSE CASES WERE INITIALLY "NO-ACTIONED" OR DISMISSED AND WHO WERE SUBSEQUENTLY REARRESTED AFTER THE 180 DAY PERIOD EXPIRED.

SUMMARY OF ARGUMENT

Respondent disagrees with Petitioner's statement of the issue in that the fact that Petitioner was arrested prior to the effective date of the amendment is irrelevant. This Court made clear in Bloom v. McKnight, Case No. 401 (Fla. Jan. 5, 1987), that the operative date is the date of the motion to discharge. If, as here, the motion is filed after the effective date, the amendment applies. The true issue presented is whether a certain class of defendants should be exempted from the terms of the amendment based upon their special situation, in that at the expiration of the 180 day period there was no case pending against them.

The Third District was presented with this precise issue in Zabrani v. Cowart, 11 FLW 2468 (Fla. 3d DCA Nov. 25, 1986). There the charges were initially dismissed, and the defendant rearrested three months after the 180 period expired. The Third District stressed the purely procedural nature of the speedy trial rule, and held that the amendment must be applied to the defendant. The analysis is lacking however, because it fails to address what Respondent sees as the underlying question; can the State rearrest the defendant years after the 180 day period expires, and still receive the benefit of the fifteen day "window" created by the amendment?

Respondent admits to genuine concern for defendants placed in the above situation, and were the speedy trial rule the only protection for such unfortunates, Respondent's position might be radically altered. However that is not at all the case. Ignored by Petitioner is his constitutional right to speedy trial. Unfortunately for Petitioner he did not seek to assert that right or establish prejudice below, instead relying exclusively on the rule which, being purely procedural, is subject to dramatic alteration. Petitioner's dilemma is that the amended rule is plain on its face, and that absent a showing of bad faith the State was entitled to the 15 day "window" in this case as in any other. To create an exemption for Petitioner would be both unwise and unwarranted.

ARGUMENT

THE 1985 AMENDMENT TO THE SPEEDY TRIAL RULE DOES NOT CONTAIN NOR CONTEMPLATE AN EXEMPTION FOR DEFENDANTS WHOSE CASES WERE INITIALLY "NO-ACTIONED" OR DISMISSED AND WHO WERE SUBSEQUENTLY REARRESTED AFTER THE 180 DAY PERIOD EXPIRED.

Petitioner includes in his statement of the issue the fact that his initial arrest was three months prior to the effective date of the amendment. Respondent submits that this fact is irrelevant under Bloom v. McKnight, supra. This Court made clear in Bloom that since the speedy trial rule is entirely procedural in nature, the date which determines the applicability of the amendment is the filing date of the motion for discharge. Thus the singular issue presented is whether an exemption from the fifteen day "window" should be declared for Petitioner and similarly situation defendants, whose cases were initially "no-actioned" or dismissed and who subsequently were rearrested after the 180 day period expired.

The most obvious obstacle for Petitioner is that no such exemption was included in the amendment, despite the fact that rearrest after the 180th day is not uncommon. In Zabrani v. Cowart, supra, the Third District faced virtually identical facts as here; Zabrani's case was

originally dismissed and he was subsequently rearrested on refiled charges three months after the 180th day. The Third District rejected Zabrani's claim by stressing the purely procedural nature of the rule; the rule called for a fifteen day "window," period. Although the result reached was infinitely correct, the Court failed to address whether the legislature had contemplated an exemption for Zabrani's class of defendants, or whether the rule imposed any time limits on the State's ability to rearrest after the 180th day and still retain the fifteen day "window." These are the two dominant questions, to which the remaining discussion will be directed.

Petitioner points to the following provision of the speedy trial rule, subsection (h)(2), as supporting the establishment of the exemption described above:

> 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 above provision refers to a very specific evil, i.e., an intentional nolle prosequi by the State for the

purpose of gaining time in which to locate witnesses, gather additional evidence, join additional defendants, etc., at the expense of the defendant's rights under the rule. Without this prohibition the State could in effect grant itself an indefinite continuance, consolidate its case at leisure, then refile charges and rearrest the defendant at the most opportune time for the State, all the while secure in the knowledge that the fifteen day "window," like the ace of trump, sat firmly in their scheming grasp. Such diabolical use of the "window" is so plainly at odds with fundamental fairness, and the prosecutor's role as an officer of the court, that the term "bad faith" hardly does it justice.

The point here is that the legislature was obviously aware of the issue, yet chose to create an exemption only for those defendants who were victims of intentional "sandbagging" by the State. The legislature could easily have proclaimed the exemption for all defendants who were rearrested after the 180th day, but did not do so. In the present case the record conclusively refutes any inference

of bad faith on the State's part. Petitioner was arrested on October 1, 1984, and the State announced a "no action"[1] on October 16, 1984. Less than two months later, on December 11, 1984, the State filed an information against Petitioner and a warrant for his arrest was issued. At this point over three and a half months remained in the 180 day speedy trial period, and if the Clerk's Office or warrants bureau had performed properly, this case would not now be before this Court. Unfortunately both failed miserably, the result being that Petitioner was not rearrested until eleven months later, some seven and a half months after the 180 day period expired.

However inexcusable, the above ineptitude is a far cry from the deliberate subterfuge condemned by subsection (h)(2) of the rule. Petitioner is therefore subject to the amendment and the fifteen day "window" contained therein.

[1] A "no action" announcement is a declaration by the State that no formal charges, by way of information or indictment, will be filed at that time.

There still remains the second question, the question of time limits. Petitioner and the trial court both express great concern over the ability of the State to rearrest a defendant years after the 180 day period, and still obtain the benefit of the 15 day "window." Such a scenario is indeed disturbing, yet in reality it is virtually impossible, for it ignores the most obvious remedy; the defendant's constitutional right to a speedy trial.

Initially it must be stressed that if a lengthy delay in rearresting a defendant was a deliberate strategy by the State to bolster its case, or weaken the defense, then subsection (h)(2) of the rule, as well as the constitutional right to speedy trial, would both mandate discharge. We are left then with Petitioner's class of cases, those which have attained middle age or beyond due to various degrees of bungling by the State and its agencies. Respondent asserts that under the rule Petitioner was not entitled to immediate discharge because of the fifteen day "window." However Respondent cannot say whether Petitioner was entitled to immediate discharge under the constitutional right to speedy trial, because Petitioner never raised the issue below.

In Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972) the United States Supreme Court established the four relevant factors for assessing speedy

trial claims: length of delay, reason for delay, the manner in which the defendant has asserted his right, and most importantly, whether the delay has prejudiced the defendant. Had Petitioner asserted this claim below, and demonstrated actual prejudice to his defense, he may have prevailed. He elected instead to rely exclusively on the rule.

Petitioner will certainly argue that to deny him relief under the rule would be an injustice of the highest order. However Petitioner overlooks a very basic fact; that he should by all rights have been called to answer the charges in December of 1984, and that he received a wholly undeserved reprieve, due not to his innocence but to a clerical error. Given the undeserved nature of this bonanza, it hardly seems unjust to require that in order to preserve it, he demonstrate actual prejudice.

CONCLUSION

The District Court's order reversing the trial court's discharge of Petitioner was proper, and should therefore by affirmed.

Respectfuly submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to KAREN GOTTLIEB, Public Defender's Office, 1351 N.W. 12th Street, Miami, Florida 33125, on this 6 day of February, 1987.

RALPH BARREIRA
Assistant Attorney General

/bf