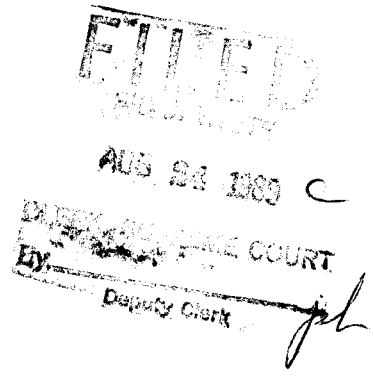
IN THE SUPREME COURT OF FLORIDA

MICHAEL BOWENS,	)	Case No. 74,370
Petitioner,	)	
vs.	)	DCA Case No. 89-0606
ROBERT W. TYSON, JR.	)	
Judge, Et. Al.,	)	
Appellee.	)	
	)	



PETITIONER'S INITIAL BRIEF

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

STEVEN MICHAELSON
Chief Assistant Public Defender
Appellate Division
Florida Bar Number 257559
201 S.E. 6th Street, Room 740
Ft. Lauderdale, Fl 33301
Telephone Number (305) 357-8671
Fax Number (305) 357-8853

Counsel for Petitioner/Defendant

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Petitioner, Michael Bowens, by and through the undersigned appointed counsel, pursuant to this Court's order of June 30, 1989, files this initial brief.

Petitioner, Michael Bowens is a Defendant in a criminal case in the Seventeenth Judicial Circuit in and for Broward County. On February 28, 1989, forty-two (42) days after his arrest, Michael Bowens moved for his release pursuant to the newly-enacted Fla.R.Crim.Pro. 3.166(b)(6) which provides that a Defendant must be charged by information or indictment within thirty (30) days of arrest, or released. Before a hearing was held, the State filed an information. The trial judge, Respondent, the Honorable Robert W. Tyson, Jr., denied release on the basis of that information filed after the Rule's time limites had expired. Michael Bowens is still in custody. His position here is a simple one: Rule 3.133 means what is says, a Defendant must be charged within thirty (30) days after arrest (forty (40) days if the State can show good cause for delay); if the State fails to charge within that time, the Defendant must be released until he is either acquitted or convicted.

STATEMENT OF FACTS

On January 17, 1989, the Defendant Michael Bowens was arrested and charged with Attempted First Degree Murder, Armed Robbery, and Possession of a Short Barrelled Shotgun.

On February 28, 1989, the Defendant filed a Motion for Pre-trial Release Pursuant to Florida Rule of Criminal Procedure 3.133(b)(6).

On February 28, 1989, the State of Florida filed an information. Said information was filed 42 days after the Defendant's arrest.

On March 3, 1989, a hearing was held on the Defendant's Motion for Pre-trial Release.

At this hearing, the State espoused, and Judge Tyson accepted the view that although Petitioner was entitled to release, the filing of an information made his rearrest lawful. In effect, the filing of an information at any time would cut off a defendant's protection under Rule 3.133(b)(6).

On March 9, 1989, in response to Judge Tyson's ruling, Petitioner filed a petition for a Writ of Habeas Corpus with the Fourth District Court of Appeals. After response by the State and reply by Petitioner, on May 17, 1989, the Fourth District denied the petition. The Court below did not address Judge Tyson's interpretation of Rule 3.133(b)(6). Rather in a somewhat enigmatic opinion, the Court stated:

> We interpret this new subsection to rule 3.133 to mean that if a Defendant is held in pretrial custody for thirty days without the filing of an indictment or information, he or she has the right, on the 30th day, to move for immediate release by court order. The court then has the authority to either release the Defendant, or, if the State can show good cause why the information has not been filed, the court may allow ten additional days for filing of an indictment or information. We do not interpret the rule to mandate automatic release if the state files an information or indictment after the thirty day period has expired, but before the court hears the Defendant's motion for release.

On June 19, 1989, the court denied Petitioner's Motion for Rehearing or Clarification and Petitioner filed Notice of Intent to Invoke Jurisdiction of this Court.

SUMMARY ARGUMENT

Petitioner contends that Rule 3.133(b)(6) is clear and means what it says: if the State fails to file an information within thirty (30) days after arrest -- or forty (40) days if the State shows good cause for delay -- the Defendant must be released from custody. Because Petitioner must address both Judge Tyson's and the Fourth District Court of Appeals' interpretations, making this argument becomes more complicated than otherwise. However, Petitioner's argument still can be stated succinctly. Judge Tyson's interpretation -- that the filing of an information at any time allows the Defendant's rearrest and cuts off his rights under Rule 3.133(b)(6) -- is wrong. It is wrong because it denies the plain meaning of the Rule, because it renders the Rule meaningless, because it is inconsistent with the remainder of Rule 3.133, and because it encourages prosecutorial trampling of Defendant's rights.

The Fourth District's interpretation -- that when a Defendant after thirty (30) days moves for his release and the State subsequently files an information, a court may nunc pro tunc find good cause for delay and allow the information to cut off release -- may be correct, but it is inapplicable to the instant case. The State filed its information against Petitioner forty-two (42) days after his arrest. Rule 3.133(b)(6) allows a court to grant the State an extension of at most ten (10) days. Thus, an information filed after forty (40) days is untimely and a court is without power to extend the State's deadline to make it so. Under the circumstances Petitioner is entitled to release.

ARGUMENT

(1) Judge Tyson's interpretation of Rule 3.133(b)(6) denies the plain meaning of the Rule.

The rules governing interpretation of the Rules of Criminal Procedure are well established. When interpreting court rules, the principles of statutory construction apply. Roe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981) aff'd 417 So.2d 981 (Fla. 1982); Hoodless v. Jennigan 41 So. 194 (Fla. 1906); Syndicate Properties, Inc. v. Hotel Floridian Co., 114 So. 441 (Fla. 1927).

It is the most basic tenet of interpretation that a rule should be interpreted according to the plain meaning of its language. Beckwith v. Board of Public Instruction, 261 So.2d 504, 506 (Fla. 1972); Sharif v. State, 436 So.2d 420, 421 (Fla. 4th DCA 1983); Vocelle v. Knight Brothers Paper Co., 118 So.2d 664, 667 (Fla. 1st DCA 1960). Judge Tyson's interpretation violates this rule. Rule 3.133(b)(6) states:

> Pretrial Detention. In the event that the defendant remains in custody and has not been charged in an information or indictment within 30 days from the date of his or her arrest or service of capias upon him or her, he or she shall be released from custody on their own recognizance on the 30th day unless the state can show good cause why the information or indictment has not been filed. If good cause is shown, the state shall have 10 additional days to obtain an indictment or file an information. If the defendant has not been so charged within this time he or she shall be automatically released on his or her own recognizance. In no event shall any defendant remain in custody beyond 40 days unless he or she has been charged with a crime by information or indictment.

It's meaning is crystal clear: If a defendant has not been charged by indictment or information within thirty (30) days of arrest

(or forty (40) days if good cause for delay is shown) he must be released. The Rule does not provide for rearrest upon filing of an information. The words of the rule are clear. They allow no alternate interpretation. The State must either charge the defendant by information or indictment or free him. Judge Tyson has allowed the State to do neither.

(2) Judge Tyson's interpretation renders Rule 3.166(b)(6) meaningless.

As shown above, the Rule's purpose is to require that the State charge the Defendant by information or indictment or release him. See also, Re: Florida Rules of Criminal Procedure, Rule 3.133 (b)(6) (Adversary Preliminary Hearings), Case No. 73,714 (Fla. June 29, 1989) Judge Tyson's interpretation of this Rule contradicts its purpose and leaves the Rule itself meaningless - - that is, of no practical effect. As is clear from the undisputed facts of this case, if Judge Tyson's interpretation of the Rule is followed, the State is not faced with any real choice or forced to take any action within any specified time period. If the State so chooses, it can leave a defendant hanging for 42 or 50 or 90 days, or perhaps a year. During this time the State may conduct a leisurely investigation, and deprive defendant of any right to demand a speedy trial. If the defendant seeks his release, the prosecutor need merely file an information, however ill-framed or incomplete, to block the release. Or the prosecutor may wait, allow the release, and re-arrest the defendant, when he sees fit to file an information or indictment. In either case, the prosecutor suffers no real prejudice.

In effect, Rule 3.166(b)(6) is rendered meaningless. It neither grants the defendant any right to be charged within a specified time, nor does it require the prosecutor to diligently pursue a case while the defendant sits in jail.

It is a fundamental tenet of law, that a court should not interpret language so as to leave a rule meaningless. See, State v. Perez, 531 So.2d 961, 963, (Fla. 1988); Villery v. Florida Parole and Probation Comm'n, 396 So.2d 1107, 1111 (Fla. 1980) This is all the more true when the Supreme Court has recently added an entire rule to further regulate the criminal process. The Supreme Court believed there existed a problem in need of remedy, and it enacted this Rule to accomplish that. Its purpose should not be frustrated by an interpretation rendering its effort a nullity.

(3) Judge Tyson's interpretation of Rule 3.166(b)(6) is inconsistent with the remainder of the rule.

Section (a) of Rule 3.166 deals with nonadversary determinations of probable cause. Section (a)(1) requires that when the defendant is in custody or there is any significant restraint on his liberty, a magistrate must determine whether probable cause exists. Section (a)(4) requires that "If . . . the specified time limits are not complied with, the defendant shall be released from custody . . . A release required by this rule does not void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial". As in Rule 3.166(b)(6), the purpose of section (a)(4) is to require that when a defendant is in custody, the prosecutor diligently pursue the case or that the defendant be released. It explicitly forbids any re-arrest or other restraint on liberty.

Judge Tyson's interpretation of section (b)(6) is flatly inconsistent with the language of section (a)(4).

Absent some compelling argument to the contrary, sections of a rule or statute should be interpreted consistently and harmoniously and the Court should view the entire rule as a whole. Perez, supra, 531 So.2d at 963; Villery, supra, 396 So.2d at 1111; State v. Rodriguez, 365 So.2d 157, 159 (Fla. 1978). Here the Supreme Court, in promulgating section (b)(6) presumably was aware of the content of section (a)(4) and aware of this rule of interpretation. Under these circumstances there is compelling reason to reject Judge Tyson's interpretation, interpret these sections consistently, and forbid re-arrest after release pursuant to section (b)(6).

(4) Judge Tyson's interpretation encourages prosecutorial trampling of defendant's rights.

As noted above, if Judge Tyson's interpretation is followed, prosecutors may ignore a defendant's rights. A defendant charged with crime and held in custody has an affirmative right to have the prosecutor diligently pursue his case and move to indict or charge by information. Under Judge Tyson's interpretation of section (b)(6), the prosecutor can be unconcerned with those rights. He need not adhere to any time limits. If faced with a request for relief, the prosecutor need only file an indictment or information to prevent release or if he chooses, wait until defendant has been released and re-arrest the defendant. This result cannot be tolerated.

(5) The Fourth District erred in that Judge Tyson was without power to grant an extension that would make the State's filing timely.

In its order, the Fourth District did not specifically address Judge Tyson's interpretation, but seemed to conclude sub silentio that rearrest was barred, thus interpreting this section consistently with section (a)(4):

> We interpret this new subsection to rule 3.133 to mean that if a defendsnt is held in pretrial custody for thirty (30) days without the filing of an indictment or information, he or she has the right, on the 30th day, to move for immediate release by court order. The court then has the authority to either release the defendant, or, if the state can show good cause why the information has not been filed, the court may allow ten (10) additionally days for filing of an indictment or information. We do not interpret the rule to mandate automatic release if the state files an information or indictment after the thirty (30) day period has expired, but before the court hears the defendant's motion for release.

In this order, the Fourth District holds that a court, at the time an information is filed more than thirty days after arrest, may find good cause for the State's delay and deny a movant's release. Petitioner concedes that the Rule is silent as to whether the State must seek an extension prior to the expiration of the thirty (30) day period. If not, the Fourt District's ruling is surely correct as to any indictment or information filed between the 30th and 40th day after arrest. However, Petitioner was charged more than forty (40) days after his arrest, and the Rule directly addresses informations filed more than forty (40) days after arrest:

> If good cause is shown, the state shall have 10 additional days to obtain an indictment or file an information. If the defendant has not been so charged within this time he or she shall be automatically released on his or her own recognizance. In no event shall any defendant remain in custody beyond 40 days unless he or she had been charged with a crime by information or indictment.

Giving this language its plain meaning, Beckwith v. Board of Public Instruction, 261 So.2d 504, 506 (Fla. 1972); Sharif v. State, 436 So.2d 420, 421 (Fla. 4th DCA 1983); Vocelle v. Knight Brothers Paper Co., 118 So.2d 664, 667 (Fla. 1st DCA 1960), the Rule gives a court the power to grant the State ten (10) additional days to file an information or indictment. However, a court may not grant a longer extension.

This is clear when the long-accepted rule of construction "expresssio unius est exclusio alterius" is applied. This means that when the rulemaker expressly states one exception to a rule or remedy for violation thereof it impliedly excludes all otehrs. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952) For example, in Dobbs, plaintiff sought to have the court imply an exception to the workman's compensation statute of limitations. The court, noting that the statute expressed one and only one exception, applied the maxim and refused to create an additional exception.

Here this Court has expressed on exception to the rule that a defendant must be released within thirty (30) days after arrest if not indicted. That exception is that the State, upon good cause shown, may obtain an additional ten (10) days to indict. When the Court created that single exception it impliedly excluded any any further grant of extensions or other opportunities to prevent a defendant's release.

Here, the State filed an information against Petitioner forty-two (42) days after his arrest. Under Rule 3.133(b)(6), Judge Tyson was without power to extend the Rule's time period sufficiently to make this filing timely. Accordingly, Petitioner must be released.

CONCLUSION

This is a simple case. Petitioner believes Rule 3.133(b)(6) means what it says. Petitioner was not charged by information within the maximum time limits allowed. The Rule's intent should be carried out and the Petitioner should be released from custody.

Respectfully submitted,

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

STEVEN MICHAELSON
Chief Assistant Public Defender
Appellate Division
Florida Bar Number 257559
201 S.E. 6th Street, Room 740
Fort Lauderdale, Florida 33301
Telephone Number (305) 357-8671
Fax Number (305) 357-8853

Counsel for Petitioner/Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petitioner's Initial Brief have been furnished by hand to the Honorable Robert W. Tyson, Jr., Room 910, Broward County Courthouse, Fort Lauderdale, Florida and to the Office of the State Attorney, Room 600, Broward County Courthouse, Fort Lauderdale, Florida, and by U.S. Mail to the Honorable Nick Navarro, Sheriff of Broward County, and to the Department of Legal Affairs, 125 N. Fridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32114, this day 23rd of August, 1989.

STEVEN MICHAELSON