Supreme Court of Florida

No. 74,961

IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL PROCEDURE--RULE 3.133(b)(6)(PRETRIAL RELEASE)

[January 18, 19911

PER CURIAM.

The Florida Bar Criminal Procedure Rules Committee (Committee) petitions this Court to amend Florida Rule of Criminal Procedure 3.133(b)(6), governing pretrial release. We have jurisdiction. Art. V, § 2(a), Fla. Const.

Present rule 3.133(b)(6) calls for the release on recognizance of detainees not charged by indictment or information within thirty days of arrest or, upon a showing of

good cause by the state, within an additional ten days. In any event, a detainee cannot now remain in custody longer than forty days unless so charged.

Previously, the state attorneys of Florida petitioned this Court to modify this rule. They contended that on occasion it is difficult to make a charging decision or to go before a grand jury within the requisite time limits. On June 29, 1989, this Court rejected the state attorneys' petition, but suggested that it would entertain recommendations from the Committee on this subject. As a result, the Committee has brought the present petition.*

We agree that some changes should be made to provide somewhat more flexibility in time limits and to clarify ambiguities in the present rule. First, we believe that the

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* The Committee requests that this Court adopt the following proposed rule:

> Pretrial Release. In the event that the defendant remains in custody end has not been charged by information, indictment or otherwise, and for whom no adversary preliminary hearing has been held within 30 days of the date of his or her arrest or service of capias upon him or her, such defendant shall be taken on or before the 30th day before a magistrate for consideration of pretrial release. Unless the state can show good cause why the charging instrument has not been filed, the defendant shall be released from custody on his or her own recognizance. Any defendant who remains in custody after the 30th day shall be brought before a magistrate at least every ten days thereafter, until the charging document is filed or defendant is released from custody.

state, in the absence of good cause, should be given three additional days in which to file formal charges after the hearing is conducted on the thirtieth day of detention. Thus, the detainee must be released on the thirty-third day if the state fails to file formal charges by that date, in the absence of good cause. If the state shows good cause, it will continue to have until the fortieth day to file charges. If charges are not then filed, the detainee must be released on the fortieth day.

We agree with the Committee that rule 3.133(b)(6) should be renumbered, although we disagree with the precise location to which it should be assigned. To clarify confusion caused by the rule's placement, we hereby renumber it as rule 3.134, to be entitled "Time for Filing Formal Charges." This change clarifies that present rule 3.133(b)(6) applies equally to misdemeanor and felony cases as well as those defendants eligible for pretrial release or pretrial detention. Some confusion has arisen about the application of the rule, and the renumbering serves as a clarification of our intent.

Second, the renumbering clarifies that detainees are entitled to the benefits of the rule whether or not they have first sought relief in a preliminary adversary hearing. Some courts erroneously have concluded that the present numbering implied that detainees must seek a preliminary adversary hearing before availing themselves of the rule. E.g., McCaskill v. McMillian, 563 So.2d 800 (Fla. 1st DCA 1990). This was never our intent.

Finally, we wish to commend the Committee for its effort to use gender-neutral language in the proposed rule. However, as noted in the recent Report of the Florida Supreme Court Gender Bias Study Commission 239 (March 1990), all gender-specific language should be avoided in drafting or amending rules of court, including the awkward "him/her" or "his/her" combinations. The rule proposed by the Committee does not meet this standard.

Gender-neutral language can be achieved with only a little forethought. Often, simple rewording can avoid the use of gender-specific language altogether. For example, the use of plural instead of singular pronouns will avoid gender-specific language entirely; and it does not change the meaning of the rules, since the courts must presume that plurals also encompass the singular. § 1.01(1), Fla. Stat. (1989). We have modified the rule to meet the recommendations of the Gender Bias Report.

For the foregoing reasons, we amend present rule 3.133(b)(6) and renumber it as rule 3.134, as reflected in the appendix of this opinion. These changes shall take effect at 12:01 a.m. on April 1, 1991.

It is so ordered.

SHAW, C.J., and BARKETT, GRIMES and KOGAN, JJ., and EHRLICH, Senior Justice, concur.
OVERTON, J., dissents with an opinion, in which McDONALD, J., concurs.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS RULE.

APPENDIX

[Additions are underlined; deletions are ~~struck through~~.]

RULE 3.134 TIME FOR FILING FORMAL CHARGES

~~(6) *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.~~ The state shall file formal charges on defendants in custody by information, or indictment, or in the case of alleged misdemeanors by whatever documents constitute a formal charge, within 30 days from the date on which the defendants are arrested or from the date of the service of capiases upon them. If the defendants remain uncharged, the court on the 30th day and with notice to the state shall:

~~(1)~~ Order that the defendants automatically be released on their own

recoanizance on the 33rd dav unless the state files formal charues bv that date: or

(2) If good cause is shown bv the state, order that the defendants automatically be released on their own recognizance on the 40th day unless the state files formal charaes bv that date. ~~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 defendants remain in custody beyond 40 days unless ~~he or she has~~ they have been formallv charged with a crime ~~by information or indictment~~

OVERTON, J., dissenting.

I dissent. The majority has adopted a mandatory, inflexible rule that requires the state to release a defendant on his or her own recognizance if a direct information or grand jury indictment has not been filed within forty days from the date the defendant is taken into custody. There are no exceptions to allow the state attorney or grand jury to secure testimony, for example, from a hospitalized material witness, or to obtain critical expert testimony or scientific reports. The failure to include an exception process in the rule is unnecessary, unwise, and contrary to the recommendations of the knowledgeable entities presenting the rules to us for our consideration. Interestingly, this rule came not from the outside but from the inside. The rule, as adopted, had its genesis in the bosom of this Court--not in the rules committee.

The Criminal Procedure Rules Committee of The Florida Bar, by a vote of 30 to 5, and the Board of Governors of The Florida Bar, by a vote of 24 to 3, recommended that the Court adopt the following proposed rule that includes an exception provision:

> Pretrial Release. In the event that the defendant remains in custody and has not been charged by information, indictment or otherwise, and for whom no adversary preliminary hearing has been held within 30 days of the date of his or her arrest or service of capias upon him or her, such defendant shall be taken on or before the 30th day before a magistrate for consideration of pretrial release. Unless the state can show good cause why the charging instrument has not been filed, the defendant shall be released from custody on his or her own recognizance.

> Any defendant who remains in custody after the 30th day shall be brought before a magistrate at least every ten days thereafter, until the charging document is filed or defendant is released from custody.

(Emphasis added.) The committee and the board of governors believed that this proposed rule properly addressed this Court's concern that there be a rule to protect against defendants' unnecessarily remaining in custody. They found justification to include a limited "good cause" exception requiring the prosecution to show cause for delay after a defendant has been held for thirty days without being formally charged and to show good cause every ten days thereafter until the charging document is filed. There is no such exception or flexibility in the rule adopted by the majority.

The committee's proposed rule would sufficiently protect a defendant from unnecessary delay in being formally charged. It should be understood that a defendant in this situation is represented by counsel and that a judge has found probable cause that this defendant committed an offense. The proposed committee rule grants a limited exception for an extension when good cause is shown to the trial judge. The exception is not open-ended; rather, it is restricted to ten days. Furthermore, the exception is reasonable. The Florida Association of Criminal Defense Lawyers, in its response filed in this cause, recognized the state attorneys' claim that the requirement that an uncharged defendant be released might "cloud t'he charging process,'' particularly in "tough cases" which require extra investigation,

such as first-degree murder cases, sexual batteries with child victims, and complex white-collar cases. The criminal defense lawyers justify the absolute rule on the basis that the prosecution has made an extensive investigation before an arrest, and they suggest that, if a prosecutor cannot decide which charges to file within forty days, he may play with the process. They offer the following as an example:

> [I]f the State Attorney cannot obtain a first degree murder indictment within the time period prescribed in Rule 3.133, he will file an information for second degree murder following arrest. The State will later obtain an indictment for first degree murder. Consequently, the alleged problems with the 40 day provision in Rule 3.133(b)(6) do not exist . . . .

This is not an acceptable solution to the exception problem.

We have a unique charging process in this state. We are one of only four jurisdictions that grant to the state attorney the authority to file a direct information. The state attorney in this state is, in effect, a one-person grand jury when filing informations for offenses less than capital. We require the state attorney, in making his charging determination, to have the same quality of testimony before him that the grand jury would have before it to return an indictment. We require the state attorney, in filing a direct information for a felony offense, to state under oath, "his good faith in instituting the prosecution and [to certify] <u>that he has received testimony under oath from the material witness or witnesses for the offense</u>." Fla. R. Crim. P. 3.140(g) (emphasis added). The reason for the rule is

to assure that the evidence that forms the basis for an information is the same type of evidence that forms the basis for a grand jury indictment.

There is no question in my mind that there will be instances occurring in serious cases where a material witness, an expert witness, or a necessary scientific report will not be available for either a grand jury or a state attorney within the mandatory forty-day cutoff period. This will result in games being played with the process, as suggested by the criminal defense bar. In fact, given the present mandatory rule, I would expect that most state attorneys will be filing informations based on hearsay evidence from investigating officers rather than "testimony under oath from the material witness or witnesses." In my view, the rule adopted by the majority will reduce the efficacy of our charging process, which was designed to assure that a defendant is correctly charged.

Finally, I am unable to understand why the majority is reluctant to put its trust in the trial judges of this state to properly administer the good-cause exception of the committee's proposed rule. Given our trial judges' similar responsibility with the speedy trial rule, why not trust them here? I trust our trial judges to properly administer the committee's proposed rule, and I find that it is clearly in the best interest of our criminal charging process. Accordingly, I dissent from the rule crafted by the majority and, instead, would adopt the committee's proposed rule.

McDONALD, J., concurs.

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