IN THE SUPREME COURT OF FLORIDA

SERMON DYESS, HENDRY
COUNTY SHERIFF,

Petitioner

v.

Case No. 75,744
2 DCA No. 90-00158

FREDDIE THOMAS,

Respondent,

_____/

BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

On September 4, 1990 the undersigned spoke to a Clerk of the Circuit Court for Hendry County who advised the undersigned that Respondent's Motion for Release, titled "Motion for Adversary Preliminary Hearing," (attached hereto as Exhibit "A") was filed on January 8, 1990. On September 6, 1990 Marquin Rinard, Assistant Public Defender, co-counsel for Respondent verified this information.

Although the opinion of the Second District Court of Appeals in Thomas v. Dyess, 15 F.L.W. D525 (2 DCA March 2, 1990) fails to address the fact that the Respondent's Motion for Release was filed on January 8, 1990, six days after the State filed its Information on January 2, 1990, the issue framed by the Second District Court of Appeals is identical to that in Bowens v. Tyson, 543 So.2d 851 (4th DCA 1989) and is in direct disagreement with the construction given to Fla.R.Crim.Proc. 3.133(b)(6) by the Fourth District Court of Appeals in Bowens v. Tyson, supra.

Because the Fourth District Court of Appeals certified a question to this Court which the Second District Court of Appeals embraced as the issue in the instant case as well, Petitioner herein would, in addition to the following argument, adopt the merit brief of the State (as Respondent) in Bowens v. Tyson, Florida Supreme Court, Case 74,370 now pending before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent was arrested on November 20, 1989 and attended his first appearance on November 21, 1989. On January 2, 1990, the State filed its Information formally charging the Respondent. On January 8, 1990, Respondent filed his Motion for Release alleging he was not charged within 30 days of his arrest and on January 10, 1990 a hearing was held on Respondent's Motion to show cause why he should not be released pursuant to Fla.R.Crim.Proc. 3.133(b)(6) because the Information was in fact filed on the 43rd day after Respondent's arrest. The trial court failed to release the Respondent indicating the personnel and administrative problems within the State Attorney's Office causing the delay was good cause shown.

Thereafter, Respondent filed his Petition for Writ of Habeas Corpus before the Second District Court of Appeal, failing to state that he filed his Motion for Release after the State had filed its Information and the State responded to his petition accordingly. On February 21, 1990, the Second District Court of Appeal issued its opinion disagreeing with the construction of Fla.R.Crim.Proc. 3.133(b)(6) as enunciated by the Fourth District Court of Appeal in Bowens v. Tyson, 543 So.2d 851 (4th DCA 1989). Although the Second District Court of Appeal, in its opinion, noted that the Information in the Bowens' case as well as in the instant case was filed after the 30 day period had expired but before the court heard the defendant's Motion for Release, it failed to address the fact that in the instant case the Respondent filed his Motion for Release six days after the State

had filed its Information. Although the court went on to address the specific merits of that case, and stating that inter office delays within the state attorney's office was not "good cause" for the late filing of charges, they specifically disagreed with the construction of Fla.R.Crim.Proc. 3.133(b)(6) as construed by the Fourth District Court of Appeals in Bowens v. Tyson, 543 So.2d 851 (4th DCA 1989).

In its opinion, the Second District Court of Appeal granted Respondent's Petition for Writ of Habeas Corpus, directing Petitioner to release him on his own recognizance. On March 9, 1990, the Second District Court of Appeal issued its mandate and on March 16, 1990 Petitioner herein filed its Notice to Invoke this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

Despite the significance of the date the Motion for Release was filed in the instant case, that is, subsequent to the filing of the Information, the Second District Court of Appeals opinion in Thomas v. Dyess does not address that significant factor but merely disagrees with the construction of Fla.R.Crim.Proc. 3.133(b)(6) as enunciated in Bowens v. Tyson, 543 So.2d 851 (4th DCA 1989); Appellee would therefore urge that where an Information has been filed prior to the hearing on a Motion for Release pursuant to Fla.R.Crim.Proc. 3.133(b)(6), (particularly when the motion is filed after the filing of an Information but before the hearing hereon) a defendant is no longer entitled to automatic release. The state should be allowed a reasonable amount of time or the time between the filing of the motion and the hearing thereon in which to file an Information. A defendant should not be permitted to ambush the State by waiting until 40 days expire from the date of his arrest in order to move for release. Additionally, should a defendant in fact be released pursuant to this rule, (which is silent regarding restraint on a defendant's liberty once he has been released) Petitioner would assert that upon the filing of an Information a defendant may be rearrested thereon.

ARGUMENT

ISSUE I

A DEFENDANT WHO IS HELD IN CUSTODY FOR 30 DAYS WITHOUT THE FILING OF AN INFORMATION OR INDICTMENT IS NOT ENTITLED TO AUTOMATIC PRETRIAL RELEASE UNDER FLA.R.CRIM.PROC. 3.133(b) WHERE THE STATE FILED AN INFORMATION BEFORE SUCH A MOTION IS FILED, OR BEFORE THE HEARING ON SUCH A MOTION IS HELD.

Although the Second District Court of Appeals appeared to frame the issue in the instant case as the same as that in Bowens v. Tyson, 543 So.2d 851 (4th DCA 1989), in fact in the instant case there is one significant difference. Here, the defendant filed his Motion for Release pursuant to Fla.R.Crim.Proc. 3.133(b)(6) AFTER THE INFORMATION WAS FILED. However the Information was in fact filed on the 43rd day, and the hearing on the Respondent's Motion was not heard until two days after his Motion for Release was filed. Petitioner would assert that as the Information was filed prior to the hearing on the Motion for Pretrial Release, Respondent was no longer entitled to be released on his own recognizance pursuant to this Rule. Rule 3.133(b)(6) provides that a defendant who has not been charged by Information or Indictment within 30 days of arrest, 40 days if good cause is shown, and remains in custody, shall be released on his own recognizance. The main thrust of the rule is emphasized in the last sentence:

> "in no event shall a defendant remain in custody beyond 40 days unless he or she has been charged with a crime by Information or Indictment" (emphasis added)

The key word is "unless": the defendant shall be released unless he has been charged.

In the instant claim, Fla.R.Crim.Proc. 3.133(b)(6) states:

> (6) Pretrial detention. In the event that the defendant remains in custody and has not been charged in an Information or an 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 ten additional days to obtain an Indictment or file an Information. If a 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.

The new rule was adopted In Re: Amendments to Fla.R.Crim.Proc., 536 So.2d 992 (Fla.1988) and became effective on January 1, 1989. There are no accompanying committed notes. This was a matter of first impression with the Fourth District Court of Appeals in Bowens v. Tyson, as it was with the Second District Court of Appeals in the instant case as well as with this Court. The Second District Court of Appeal interpreted this new subsection:

> "In Bowens v. Tyson, 543 So.2d 851 (4th DCA 1989), the Petitioner moved for pretrial release after 42 days in custody, and charges were filed prior to the show cause hearing. The district court interpreted the rule as authorizing the detainee "to move for immediate release by court order" upon the expiration of the relevant time periods, but not as "mandating automatic release if the State files an Information or Indictment after the 30 day period has expired, but

> before the Court hears the defendant's motion for release" (as happened in both Bowens and the present case) 543 So.2d at 852.
>
> We must disagree with this construction of the new subsection. Particularly when Rule 3.133 is viewed as a whole, it instead appears to require the State to File within a certain time period or lose the right to insist upon the defendant's continued detention.

Petitioner would first assert that the Second District Court of Appeals erred in granting Respondents's Petition for Writ of Habeas Corpus. Additionally, Petitioner would state that Respondent has suffered no prejudice to his case by his continued detention, nor will he suffer any prejudice inasmuch as on February 15, 1990 Respondent went to Jury trial on his pending charge and was found guilty.

It is clear that when interpreting court rules, the principles of statutory construction apply and a rule should be interpreted according to the plain meaning of its language. Rowe v. State, 394 So.2d 1059 (1st DCA 1981), aff'd 417 So.2d 981 (Fla.1981); Beckwith v. Board of Public Instruction, 261 So.2d 504 (Fla.1972). Looking then to the provision in question it obviously presupposes a hearing on the 30th day only if a motion has been filed. Because in his initial Petition for Writ of Habeas Corpus before the Second District Court of Appeals, Respondent failed to advise that court that his Motion for Release was filed after the Information was filed, (leaving the Second District Court of Appeals opinion without that significant factor and therefore in conflict with the decision from the

Fourth District Court of Appeals in Bowens v. Tyson, supra) the instant case comes to this Court in a posture of conflict. Nevertheless Petitioner would assert the plain meaning of the language of this provision defeats Respondent's argument. Although a case involving speedy trial provisions, in Singletary v. State, 322 So.2d 551 (Fla.1975) the court articulated that procedural rules should be given a construction calculated to further justice, and not to frustrate it. Inasmuch as the purpose of Rule 3.133(b) is to protect persons held in custody from remaining there indefinitely on account of the State's failure to file formal charges against them, Beicke v. Boone, 527 So.2d 273 (1st DCA 1988), that purpose was not violated in the instant case. Furthermore, it is a well settled rule of law that a statute or rule should be viewed as a whole. State v. Rodriguez, 365 So.2d 157 (Fla.1978); Shuman v. State, 358 So.2d 1333 (Fla.1978).

Rule 3.133(a)(4) and (b)(5) as well as (b)(6), contain language that release shall be ordered "unless an Information or Indictment has been filed". When looking at the rule as a whole, release is no longer mandatory or automatic once an Information or Indictment has been filed. Thus, once Petitioner was charged with the crimes in the instant case, he was no longer entitled to be released on his own recognizance pursuant to Rule 3.133(b)(6).

Under Rule 3.133(b)(1) - (5) when a defendant has not been charged by an Information or Indictment after 21 days from the date of his arrest, he has the right to an adversary preliminary hearing. The defendant must demand the hearing. The filing of

the Information or Indictment between the filing of the motion and the hearing does not eliminate the defendant's right to that hearing. Again, although we are faced here with a situation where the motion was filed after the Information, the opinion of the Second District Court of Appeals does not address that issue, leaving its opinion squarely in conflict with Bowens v. Tyson, supra, but even if the Information is filed after the Motion for Release, but before the hearing thereon, Petitioner would urge that the fact that the time period expired before the Information or Indictment was filed does not automatically entitle the defendant to mandatory release.

Thus, under Rule 3.133(b)(1) - (5), the State is given the opportunity to correct its inadvertent failure to file the Information within 21 days by showing at a hearing that probable cause exists. If probable cause is shown, then the defendant is not entitled to release. The State should then be given an opportunity to correct the nonfiling of the Information under 3.133(b)(6). A defendant should not be released due to the inadvertent nonfiling of an Information within 30 days of arrest where the Information was filed prior to filing of the Motion of Release as is the situation in the instant case or as the Second District Court of Appeals addressed it in its opinion, where the Information was filed subsequent to the filing of the Motion for Release but prior to the hearing on that motion for release. The filing of the motion puts the State on notice that it must "put up or shut up". Once the motion has been filed, the State is on notice that it must either file an Information, show good cause

why no Information has yet been filed, or agree that the defendant should be released on his own recognizance. Therefore, the State should have a reasonable amount of time after the filing of a defendant's Motion for Release in which to file the Information. (Again Petitioner is acutely aware that in the instant case the Motion for Release was filed subsequent to the filing of the Information, however, once again Petitioner feels compelled to advise this Court that the opinion of the Second District Court of Appeals ignores that factor, apparently because Respondent failed to advise that court of this sequence of events in his original Petition for Writ of Habeas Corpus).

Certainly a reasonable amount of time from the filing of a defendant's motion is necessary in order to ensure that the defense does not ambush the State by waiting for the 40 day period set out in the rule to expire and then demand automatic release. The purpose of the rule is obviously to light a fire under the State to ensure that a defendant is not held indefinitely and that an Information or an Indictment is filed within a reasonable amount of time or a defendant will be released. Herein, however, Respondent has successfully accomplished form over substance. An interpretation of a statute, or in this case a rule, which leads to an unreasonable or ridiculous conclusion will not be adopted. Drury v. Harding, 461 So.2d 104 (Fla.1984). Furthermore, statutes or rules should be construed in light of the manifest purpose to be achieved. Tampa-Hillsborough County Express Authority v. K.E. Morris Alignment Service, Inc., 444 So.2d 926 (Fla.1983).

Petitioner would further assert that by waiting until the outer time limits provided for in the rule had expired before filing his Motion for Release, the State could not cure the problem either by filing an Information, or proceeding to hearing on the Motion for Release, because under Respondent's interpretation of the instant rule, even if his Motion for Release is filed after the Information was filed, once the 40 days has run a defendant should automatically be released. Petitioner would assert that the purpose of the rule was to keep defendants from being held in jail indefinitely without having been charged with a crime and does not provide for automatic release where a defendant was not charged by the 30th day. Rather, after 30 days has passed, a defendant has a right to file a Motion for Release unless the State can show good cause why no Information was filed in which case the State has an additional ten days in which to file the Information. The ten day time period provided for in Rule 3.133(b)(6) is akin to the 15 day time period which is provided for in the speedy trial rule, Fla.R.Crim.Proc. 3.191(i)(4). That rule provides:

> (4) no later than five days from the date of filing of a motion for discharge, the court shall hold a hearing on the motion, and unless the court finds that one of the reasons set forth in Section (d)(3) exists, shall order that the defendant be brought to trial within ten days. If a defendant is not brought to trial within the ten day period through no fault of the defendant, the defendant shall be forever discharged from the crime.

The committee note further states:

> The intent of (i)(4) is to provide the state attorney with 15 days within which to bring a defendant to trial from the date of the filing of the motion for discharge. This time begins with the filing of the motion and continues regardless of whether the judge hears the motion.

Pursuant to Rule 3.191(i)(4), once a defendant files a Motion for Discharge, the 15 days time period beings to run. If the State fails to bring the defendant to trial during this 15 days, the defendant is forever discharged from the crime. While the remedy provided for defendants in Rule 3.133(b)(6) is not as drastic as that which is provided for in Rule 3.191(i)(4), Petitioner asserts that a delay by the State under Rule 3.133(b)(6) should be treated as it is in Rule 3.191(i)(4). The State should be given additional days from the date the Motion for Pretrial Release is filed. If the defense does not file its Motion for Release until the 45th day, the State should not be penalized, particularly in light of the instant facts where the information was filed, albeit after the 40th day, but prior to the filing of the motion as well as the hearing thereon. Petitioner would assert that only if the State fails to file an Information subsequent to the filing of the defendant's Motion for Release and thereafter fails to show good cause why no Information was filed should a defendant be released on his own recognizance. It is apparent that Respondent interprets the instant provision to mean that on day 40, a defendant must be released no matter when the Motion for Release was filed, and Petitioner would assert that this could quite likely lead to the adverse consequences of a defendant vanishing after release.

While this rule was put into effect to protect the rights of defendants, this Court must not lose sight of the need to protect society as well. "But justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained until it is narrowed to a filament." Snyder v. Massachusetts, 291 U.S. 97 (1934). By allowing a defendant to be automatically released on his own recognizance because the State has failed to file an Information within 30 days and the defendant lies in wait until 40 or more days have passed before the filing of his Motion for Release serves neither the purpose of the rule, nor the citizens of this State.

Again, although couched in speedy trial considerations, in State v. Roundtree, 438 So.2d 68 (2nd DCA 1983) the court indicated that factors to be utilized in determining whether a pretrial delay is violative of a defendant's rights includes the length of the delay, the reason for the delay, the timely assertion of the right, and the existence of actual prejudice as a result of the delay. The court went on to state that no single factor is either necessary or sufficient as a precondition to a finding of a denial of the defendant's rights, rather the court must balance and weigh the factors against each other in light of the purposes sought to be achieved by speedy trial provisions. Petitioner would therefore assert that despite the fact that Respondent's Motion for Release in fact followed the filing of the Information (although both were filed after the 40th day) the fact remains that the Second District Court of Appeals opinion, is clearly in conflict with that of the Fourth District Court of

Appeals in Bowens v. Tyson, supra, and has placed form over substance, and the factors articulated in State v. Roundtree, supra, should have been applied and better serve the purposes of all interests involved. Petitioner would finally urge upon this Court the reasoning employed by the Fourth District Court of Appeals in Bowens v. Tyson, supra and ask that same reasoning be applied herein.

CONCLUSION

WHEREFORE, based on the foregoing arguments, and citations of authority, Petitioner respectfully requests that the judgment of the trial court be affirmed and the decision of the Second District Court of Appeals be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct coy of the foregoing has been forwarded by U.S. Mail to Douglas M. Midgley, Public Defender, P. O. Box 1345, Labelle, Florida 33935 this 6th day of September, 1990, and Diane Dramko, Esquire.

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