IN THE SUPREME COURT OF FLORIDA

SERMON DYESS, HENDRY COUNTY SHERIFF
Petitioner

vs.

FREDDIE THOMAS
Respondent

CASE NO. 75,744

SECOND DCA CASE NO. 90-00158

REPLY BRIEF OF RESPONDENT

DOUGLAS M. MIDGLEY
PUBLIC DEFENDER
TWENTIETH JUDICIAL CIRCUIT
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COUNSEL FOR RESPONDENT

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SUMMARY OF ARGUMENT

The cornerstone of the criminal justice system in Florida, and in every other state of the United States, is that a person accused of a crime is innocent of that crime until proven guilty. Florida Rule of Criminal Procedure 3.133(b)(6) balances that fundamental right with the right of the citizens of the state to be protected against those who may pose a threat to them or their property.

Rule 3.133(b)(6) allows the State of Florida to incarcerate an individual arrested for a crime for 30 days, or upon a showing of good cause, for up to 40 days, without the filing of an information or indictment. If the State Attorney cannot show good cause after 30 days, or fails to file an information or indictment within 40 days the Rule is simple and clear: the incarcerated individual shall be released.

Nothing in the Rule requires the filing of a Motion for Release or the setting of a hearing (as does Rule 3.133(b)(1). The Rule without any ambiguity states the defendant shall be released on the 30th day unless the state can show good cause for the delay, and under no circumstances where good cause is shown, shall the defendant be kept in custody unless an information or indictment is filed before the end of the 40th day.

On what day a Motion for Release is filed is of no consequence. The burden is on the State to file charges within the appropriate time periods or the defendant will be released from custody pending disposition of the case. The Rule itself puts the State on notice of the time periods. There is no requirement for the defendant to remind the State that it's time for filing is running short. It is ludicrous to suggest that the defendant ambushes the State by waiting until the 40th day to demand release.

In the present case the Second District Court of Appeal looked to the facts

and found that Freddie Thomas was incarcerated for more than 30 days without a showing of good cause and for more than 40 days before an information was filed. Next it looked at the plain language of Rule 3.133(b)(6) and determined that under the facts presented, Freddie Thomas' release was mandated. Respondent now urges this Court to adopt the sound reasoning of the Second District Court of Appeal.

A R G U M E N T

ISSUE I

A DEFENDANT WHO IS HELD IN CUSTODY FOR 30 DAYS OR UPON A SHOWING OF GOOD CAUSE FOR 40 DAYS, WITHOUT THE FILING OF AN INFORMATION OR INDICTMENT IS ENTITLED TO AUTOMATIC PRE-TRIAL RELEASE PURSUANT TO FLA. R. CRIM. PROC. 3.133(b)(6)

Petitioner seeks this Court to overturn the decision of the Second District Court of Appeal granting Respondent's Petition for Writ of Habeas Corpus. Petitioner asserts that since the State filed an information prior to the hearing on the Motion for Release, the rule precludes the Respondent from being released. However, the rule does not preclude a Defendant from subsequently filing a Motion for Release.

It seems to the Respondent, the Petitioner seeks this Court to change the present law instead of ruling on the present law's interpretation. The present 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 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. (Emphasis added)

It specifically states that if a Defendant is in custody and an information is

not filed within thirty (30) days, the Defendant shall be released on his own recognizance unless the State can show good cause why an information has not been filed. In the present case, the State filed an information on the 43rd day. Pursuant to Fla. R. Crim. Proc. 3.133(b)(6), the Respondent motioned the court for release. The State never sought the extension, but stated in the hearing reasons for the delay. The Second District Court of Appeal held that the State Attorney's intra-office delays did not establish good cause to detain Respondent in jail past the limits established by the rule. Therefore, it granted Respondent's Petition for Habeas Corpus. Thomas v. Dyess, 15 F.L.W. D525 (2nd DCA, March 2, 1990).

Courts have held that where a rule is unambiguous, it should be accorded its plain and ordinary meaning. Rowe v. State, 394 So.2d 1059 (1st DCA, 1981). Here, the language used indicates a clear intention to release persons in custody after forty (40) days if no information has been filed. The rule does not indicate in anyway that when the State files an information, the rule no longer applies to an incarcerated Defendant. If a statute admits a reasonable construction which will give effect to all of its provisions, a court will not adopt a strained reading. Meltzer v. Board of Public Instruction of Orange County, Fla., 548 F.2d 559, reh'g granted 553 F.2d 1008, rev'd 577 F.2d 311, cert. denied, 439 U.S. 1089 (1977).

Generally, a statute should be construed as a whole or in its entirety and the legislative intent gathered from the entire statute rather than from any one part thereof. State v. Hayles. 240 So.2d 1 (Fla. 1970). Fla. R. Crim. Proc. 3.133 deals with Pre-Trial Probable Cause Determinations and Adversary Preliminary Hearings and sets out when a motion for a hearing applies. In Fla. R. Crim. Proc. 3.133(b)(1) it states:

> A Defendant who is not charged in an Information or Indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him.

However, in section (b)(6) of the rule, it does not indicate that a hearing is required to determine if the Defendant should be released. The rule states that the Defendant shall be released. Taking the statute as a whole, if a person is denied release after a 21 day hearing, he is still eligible for release after 30 days if no good cause is found for the delay of the filing of an information or after 40 days automatically. The rule does not state that a Defendant must file a motion to trigger the statute into effect. If the rule intended a motion to be set to give the State an opportunity to "put up or shut up", it would have so indicated. The rule requires the State to file within a certain time period or lose the right to insist upon the Defendant's continued detention.

The Petitioner seems to indicate the burden should be upon the Defendant to notice the State when the time period has elapsed as in the Speedy Trial Rule, Fla. R. Crim. Proc. 3.191(i)(3). Fla. R. Crim. Proc. 3.191(i)(3) indicates that a Motion must be filed by the Defendant for discharge and "that Court shall hold a Hearing on the Motion". In that rule, it clearly indicates the Defendant must file the Motion in order to start the time period running. However, Fla. R.Crim Proc. 3.133(b)(6) does not indicate in any way that a motion must be filed to start the time period to run as the Petitioner states in its argument. The Defendant should not be the one to put the State on notice. Petitioner also feels that when the defense waits until after the 40-day period to file a Motion for Discharge, the defense is trying to ambush the State. That is an unfair accusation. The defense must do what is in the best interest of its client and

if waiting for more than 40 days to file the motion will be beneficial to the Defendant, then defense counsel is obligated under the Model Rules of Professional Conduct to do so. Also, Fla. R. Crim. Proc. 3.191(i)(3) is distinguishable in that the Defendant seeks a Motion to Discharge and if granted, it precludes the State forever from bringing charges against the Defendant on that charge. Fla. R. Crim. Proc. 3.133(b)(6), however, only releases the Defendant from custody, a case can still be brought against him once the State files charges. The rule protects the Defendant and yet does not unduly prejudice the State.

Moreover, Petitioner feels that the State should be given a reasonable amount of time to file an information. However, Fla. R. Crim Proc. 3.133(b)(6) only gives the State 30 days, unless good cause is shown for 10 additional days, and not a "reasonable amount of time". Petitioner seeks the Court not to lose sight of the need to protect society as well while protecting the rights of Defendants. Respondent agrees. The present rule balances the two. The rule tries to prevent a person from sitting in custody while the State Attorney's office decides if formal charges should be brought. The rule forces the State to evaluate its cases to prevent an injustice that may occur. The rule does not preclude the State from subsequently filing charges, only from detaining him in custody past 40 days maximum. Society is not harmed by the present rule. If the State has a case against a Defendant, an information could be filed within 30 days. If after 30 days, the State could not file charges yet, it could seek an additional 10 days if it shows good cause for the delay. If not, the accused must be released on his own recognizance. A State "is free to regulate the procedure of its Courts in accordance with its own conception of policy and fairness unless in so doing it offends some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Snyder v. Massachusetts, 291 U.S. 97 (1934). A person has the fundamental right

to be considered innocent until proven guilty. A person should not be held longer in custody, losing his freedom, if the State cannot formally charge him within 40 days maximum. Petitioner also fears that this result could "quite likely lead to the adverse consequences of a Defendant vanishing after release". However, the Courts accept the practice of releasing persons on their own recognizance. Is the Petitioner stating it wishes to abolish any type of release because the Defendant may vanish? This notion contradicts a person's right to pre-trial release pending a trial.

Furthermore, Petitioner states that the rule does not automatically release the Defendant without a motion. However, the rule uses the work "shall" and not "may" in its construction. As used in statutes, the "shall" is construed as mandatory. Tascano v. State, 363 So.2d 405 (Fla. App. 1978); Drury v. Harding, 461 So.2d 104 (Fla.,1984). The language is clear in its wording and intent. "He or she SHALL be released from custody on their own recognizance". (Emphasis added)

Also, Petitioner falsely claims that Defendant has not suffered any prejudice because a jury subsequently found Defendant guilty of the charges. Defendant, though, had suffered greatly by being illegally detained for approximately 55 days before his trial on February 15, 1990; days in which he could have been out of custody helping counsel preparing his defense and locating witnesses.

Finally, the Petitioner feels that the Respondent misled the Second District Court of Appeal by not informing the Court of the sequence of events. However, this is not relevant because the defense has no obligation to file a motion per the statute. In fact, the rule puts the obligation on the State to seek a 10-day extension once the 30 days has run by showing good cause. The obligation never shifts to the Defendant. Furthermore, if the Petitioner felt

that the Second District Court of Appeal would have ruled differently if the court knew the Respondent filed its motion subsequent to the filing of the information, it could have raised the point in their Response to Petition for Writ of Habeas Corpus. However, no argument was made. Therefore, the Petitioner should be precluded from asserting this argument now.

Respondent, therefore, respectfully seeks this Court to interpret the rule as it was plainly set out. The Respondent urges the Court not to follow the Fourth District Court of Appeal in Bowens v. Tyson, 543 So.2d 851 (4th DCA, 1989) but to apply the same interpretation of the law as the Second District Court of Appeal did in Thomas v. Dyess and uphold its ruling.

CONCLUSION

WHEREFORE, based on the foregoing arguments and citations of authority, Respondent respectfully requests this Honorable Court to affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Honorable Robert A. Butterworth, Attorney General, Office of the Attorney General, Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33602; Erica M. Raffel, Assistant Attorney General, Office of the Attorney General, Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33602 and to Peggy A. Quince, Assistant Attorney General, Office of the Attorney General, Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33602 this 27th day of September, 1990.

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