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IN THE SUPREME COURT OF FLORIDA

STEVEN VALDEZ,
Petitioner,

-VS- CASE NO. 76,260

STATE OF FLORIDA,
Respondent,
_____/

KEVIN J. ORY,
Petitioner,

-VS- CASE NO. 76,311
STATE OF FLORIDA,

Respondent.
_____/

LAWRENCE A. DEMERS,
Petitioner,

-VS- CASE NO. 76,310

STATE OF FLORIDA,
Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent rejects petitioners' statement of the case and facts as containing matters outside the record and states that the record facts are as follows

On March 30, 1990 a clerk at Carter's Food Store was accosted by a man in an army camouflage uniform. This individual told the clerk he had a bomb and demanded the money. The individual sprayed mace in the clerk's face grabbed the money and ran to a waiting truck. A customer followed the men and obtained a tag number and a vehicle description. During the time the customer followed the truck, the robbers threw items at the customers car and attempted to run it off the road. The customer abandoned the chase and called the police. Officers responded quickly and observed a vehicle fitting the description of the truck. The officers unsuccessfully attempted to stop the vehicle which fled at high speed. The vehicle attempted to run a roadblock but went out of control crashing into a telephone pole. The officers arrested the suspects and located two possible destructive devices in the vehicle. The individuals were booked into the jail and were charged with armed robbery, threat to discharge a destructive device, possession of a destructive device, two counts of aggravated assault, aggravated battery, throwing deadly missiles at an occupied vehicle, and fleeing and attempting to elude a police officer. (petitioner's appendix, arrest affidavit)

On May 10, 1990, petitioner Valdez filed a demand for discharge and a request for an adversary preliminary hearing. (petitioner's appendix, motion) On May 11, 1990, the assistant state attorney filed an information charging all three defendants. (petitioner's appendix, information). On May 14, 1990, the court held a hearing on petitioner Valdez's motion. At that hearing petitioners Demers, and Ory, orally joined in Valdez's motion. The motion for discharge from custody was denied by the trial court in a written order. (petitioner's appendix, order). All three defendants filed petitions for writs of habeas corpus in the district court. The district court denied relief but certified to this court the question of the correct interpretation of Rule 3.133 Fla.R.Crim.P.. All three defendants invoked the discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

In this brief, respondent argues that the district court properly interpreted the rule. The district court correctly held the discharge provision does not exist independently of the other provisions of the rule. Moreover, the court's interpretation of the rule is consistent with the constitutional limitations on the power of courts to create rules dealing with substantive law issues. Finally, no rule should be interpreted in a fashion so as to allow a party to achieve through a procedural device something he is not entitled to under the substantive law of the state.

ARGUMENT

ISSUE

WHETHER THE FIRST DISTRICT COURT OF APPEALS CORRECTLY INTERPRETED THE DISCHARGE FROM CUSTODY PROVISION OF RULE 3.133(b)(6) FLA.R.CRIM.P.

As an initial matter respondent asserts that the legislature passes laws dealing with substantive matters and courts make rules dealing with procedural matters. This axiom is a fundamental precept of our constitutional system, for, it is the very essence of the separation of powers doctrine. Any overstepping of the boundaries creates conflict which must be harmonized with these basic principles. Smith v. State, 537 So.2d 982 (Fla. 1989).

Petitioner's analysis of Rule 3.133(b)(6) Fla.R.Crim.P. provides much to narrow a focus for this issue. This rule operates within a broad statutory and constitutional framework.

Respondent acknowledges petitioner's right to reasonable bail, his right to a prompt non-adversarial probable cause determination, and his right to prompt notification of what charges he is being held on. Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975). These rights are based on constitutional guarantees such as Article I, §14 Fla. Const. which states:

> Pretrial release and detention.--Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Additionally, Chapters 903 and 907 Fla. Stat. set out the substantive law on pretrial detention and release. In §907.041 Fla. Stat. the legislature set out the purpose for and the criteria for the application of this substantive law when it stated:

> (1) LEGISLATIVE INTENT.-It is the policy of this state that persons committing serious criminal offenses, posing a threat to the safety of the community or the integrity of the judicial process, or failing to appear at trial be detained upon arrest. However, persons found to meet specified criteria shall be released under certain conditions until proceedings are concluded and adjudication has been determined. The Legislature finds that this policy of pretrial detention and release will assure the detention of those persons posing a threat to society while reducing the costs for incarceration by releasing, until trial, those persons not considered a danger to the community who meet certain criteria. It is the intent of the Legislature that the primary consideration be the protection of the community from risk of physical harm to persons.

In particular, §907.041(2), Fla. Stat., authorizes the Supreme Court to promulgate rules setting forth the procedures for pretrial release. It did not authorize the creation of new substantive rights by the promulgation of these rules. See Smith v. State, 537 So.2d 982 (Fla. 1989). In response to Chapter 907, Fla. Stat., and the 1982 constitutional amendment, the court created Rule 3.132, Fla.R.Crim.P., authorizing pretrial detention upon motions of the state attorney.

Recently, the Florida Supreme Court amended the rules regulating pretrial procedures, in doing so it substantially modified Rule 3.133 Fla.R.Crim.P. The modified rule section in question, 3.133(b)(6), was added during the court's regular four year cycle of rule amendments. It was initiated by the court and adopted without substantial comment. It's promulgation was apparently unnoticed by the criminal rules committee which requested the court to vacate the rule. In deciding not to vacate the rule, the court stated that:

> At this junction, the Court is unwilling to repeal the new amendment without some provision in the rules to protect against the possibility of prisoners remaining in custody indefinitely without being charged in cases in which no justification exists for the delay.

In Re Rules of Criminal Procedures, Rule 3.133(b)(6), 545 So.2d 266 (Fla. 1989).

This is a very important statement of intent which should be used by this court in deciding how to interpret this rule. Petitioner complains that, if the rule is interpreted as the court did below, the rule will be reduced to merely a way to require the state to promptly charge defendant. Based on the statement of this court, that is the rule's intended function. Therefore, this court should affirm the district court's interpretation of the rule and deny the relief requested.

Respondent acknowledges that there are two differing and conflicting lines of cases interpreting this rule. In Bowens v. Tyson, 543 So.2d 851 (Fla. 4th DCA 1989).[1] The court held that the rule provides a procedure whereby the defendant can force the state to charge him or release him, but, does not provide a mechanism for automatic release. The Second District Court in the case of Thomas v. Dyess, 557 So.2d 196 (Fla. 2nd DCA 1990) held that the rule provides for automatic discharge. In the instant case, the First District Court of Appeal sided with the Fourth District and held that the rule does not grant automatic discharge. The position of the Third District is in accord with that of the First and Fourth. Lott v. Lawrence, 15 F.L.W. 1758 (Fla. 3rd DCA July 13, 1990).

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[1] Bowens contained a certified question which as accepted by the Florida Supreme Court, case #74,370. The case was orally argued in February 1990.

As previously stated, this rule does not operate in a vacuum. The legislature through §907.041(3) Fla.Stat. and the court through Rule 3.131 Fla.R.Crim.P. have provided a mechanism and stated a preference for the ROR release of individuals charged with crime. Further, a mechanism has been provided for a defendant to seek a reduction in his bond and petition this court if the "bail" is "unreasonable." Rule 3.131(d)(3) Fla.R.Crim.P. Moreover, a mechanism exists to challenge the legal basis for any detention past 21 days, by requiring the state in an adversary preliminary hearing to prove probable cause exists to believe the defendant committed a particular crime. Rule 3.133(b)(4)-(5) Fla.R.Crim.P. Therefore, petitioner's constitutional rights to reasonable bail, and to challenge the basis for his detention are fully protected by other relevant rule provisions. Kennedy v. Crawford, 479 So.2d 758 (Fla. 3rd DCA 1985). Thus, the expansive interpretation of this rule sought by petitioner should be rejected. Moreover, even when a defendant is detained without the possibility of pretrial release, automatic discharge from custody is not constitutionally required even when legislatively created time frames are not strictly complied with. United States v. Guadalupe Montalvo-Munillo, 4 F.L.W. Fed. (United States Supreme Court, June 1, 1990).

Respondent asserts that the (b)(6) rule was promulgated with the idea that a defendant incarcerated for 21 days would

file for an adversary preliminary hearing. This motion would notify the state attorney of the problem and give him several days to take the necessary sworn testimony. (Rule 3.140(g), Fla.R.Crim.P.). As determined by the district court, the placement of the subsection within the adversary preliminary hearing section of the rule supports this interpretation. The (b)(6) right of discharge is not a right separate and apart from the rest of the adversary preliminary hearing process. If it was intended as a substantive right apart from the adversary preliminary hearing, the section would have been placed in Rule 3.131 Fla.R.Crim.P. Respondent asserts that (b)(6) is applicable only in conjunction with the full adversary preliminary hearing process, it has no effect until probable cause is found at the preliminary hearing and the state still has not charged the defendant. This proposition is supported by cases such as Payret v. Adams, 471 So.2d 218 (Fla. 4th DCA 1985) where the district court struck down an administrative order which provided an automatic ROR at the end of the 21 day period. In Payret the court stated that the reduction of bond must be done in a manner authorized by law not by judicial fiat. It is also supported by Kennedy v. Crawford, a case in which the court held that this rule procedure is not constitutionally mandated. Therefore, since the rule procedures are not constitutionally or statutorily mandated, the rule can be upheld only if, as Respondent assert, it grants no new substantive right.

Interpreting the rule as the district court did is consistent with the language used in each of the sections of 3.133(b): (b)1 states,

> (1) When applicable. 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. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

(b)(6) begins

"In the event that the defendant remains in custody" . . . The question is, remains in custody after what? The answer is clear, remains in custody after an adversary probable cause hearing. Therefore, to involve the provision of this section:

1. have an adversary preliminary hearing;
2. have the judge find probable cause and order the defendant to remain in custody;
3. have no formal charges filed;
4. have 30 days has elapsed.

Then and only then can the state be ordered to show cause to continue to detain you. If it does, the state has 10 days or until the 40 days period is up to obtain an indictment or file an information.

Petitioner's argument presupposes that the state has the ability to file an information any time it chooses. It ignores the plain language of Rule 3.140 Fla.R.Crim.P. which allows the filing of a felony information only after the state attorney

or assistant state attorney has received testimony under oath from material witnesses.

Petitioners never timely filed a motion for an adversary preliminary hearing, they waited and filed for discharge. In fact, petitioners Ory and Demers did not even file an oral motion until after the state had filed it's information. Therefore, they never properly invoked the procedures required to activate the ROR release provision. The information was filed prior to the hearing on the motion or the adversary preliminary hearing. Therefore, the defendant could not possibly meet the criteria of the rule, (i.e.) that at the close of an adversarial preliminary hearing, if the defendant is still not charged he is entitled to have the state show cause why he shouldn't be released. Thus, as to the petitioners, the court properly applied the rule. The trial court's order did not deny the defendants their right to the adversarial preliminary hearing or the protection of the rule.

Respondent asserts that to the extent that the rule provides a procedure by which a trial court can require a defendant to be charged within a reasonable period of time. It is proper. To the extent that petitioner asserts that this procedure gives them a substantive right to discharge from custody, they are wrong. The court can set procedures for implementing rights but cannot controvert valid legislature enactments nor can it enact rules which create substantive law. Smith

As noted, the court rules cannot control when we are dealing with substantive law areas. In Chapter 907 and 903 and in Article I §14 of the Florida Constitution, certain situations arise which may preclude the granting of bail. The person may be charged with a offense punishable by life imprisonment and the proof of guilt is evident and the presumption great. The State may have had a motion for pretrial detention granted pursuant to Chapter 907 and rule 3.132 Fla.R.Crim.P. In light of these provisions regulating bail, petitioner's absolute right argument must fail.

In fact, that is the exact factual situation presented by this case. Petitioners are charged with a first degree felony punishable by life. They are not entitled to bail at all. Thus, this is a back door attempt to procedurally obtain a pretrial release that substantive law holds they are not entitled to. Moreover, petitioner's offenses of armed robbery, aggravated battery, and threat to throw a destructive device fit within the categories for which the legislature has authorized pretrial detention pursuant to Chapter 907, Fla. Stat.. In light of these facts, and in light of the constitutional and statutory provisions regulating pretrial release, this court's procedural rule cannot be interpreted so as to create a substantive right of automatic release without running a foul of the separation of powers doctrine. Smith.

An analogous rule is Rule 3.191 Fla.R.Crim.P., the speedy trial rule. Defendants have a constitutional right to a speedy trial. However, that right incorporates no specific time frames. Furthermore, just like the rule in question, the court is authorized by Chapter 918 Fla. Stat. to create a rule of procedure implementing the speedy trial right. Procedurally, a defendant may demand a speedy trial but this demand is effective only if he is ready for immediate trial. Also, he can move for discharge but he receives discharge only if he is ready for trial, has not waived his speedy trial rights directly or indirectly, and if the state does not try him within 15 days after he files his motion. However, a defendant can not claim the protection of the rule's discharge provision until he complies with the rule's complete provisions.

Because the rule provisions in question are similar to the provisions of §3.191, Fla.R.Crim.P., this court could also apply principles developed under that rule which infer a waiver or a tolling of the time period when the defendant acts in a certain fashion. See State v. Belien, 379 So.2d 446, (Fla. 3rd DCA 1980); Smith v. State, 482 So.2d 521, (Fla. 2nd DCA 1986). Under this analysis, by waiting 20 days to file his motion for an adversary preliminary hearing, the defendant waived the time periods of the rule, or, extended each of them by 20 days. As repeatedly noted by Judge Schwartz of the Third District Court

of Appeal,[2] these procedural rules are designed to effectuate a purpose. They are not created as a methodology to grant new rights. See Rubiera v. Dade County, 305 So.2d 161 (Fla. 1974). Petitioner's tactics establish that they had no desire to be speedily charged. If their desire was to be speedily charged they could have filed for an adversary preliminary hearing after twenty-one days, or attempted to obtain a hearing after thirty days by invoking the good cause shown provision of the rule. However, they did nothing, they waited until the forty days had run and then sprung their "gotcha". These "gotcha" tactics should be rejected by this court. This court should interpret the rule as the First District, the Third and the Fourth District Court of Appeals have done and deny the petition.

The State suggest that a single modification of the rule will suffice to correct the confusion and reduce litigation at the same time. Interpret the rule as the State suggests and require a request for an adversary preliminary hearing as a prerequisite. Additionally, delete (b)(6) and substitute language requiring the State to show cause in the event an information is not filed within 15 days of the timely request for adversary preliminary hearing

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[2] Rule 3.191 provides a right to a speedy trial not a right to a speedy discharge. State v. Brown, 527 So.2d 209 (Fla. 3rd DCA 1988); Zabrani v. Coward, 502 So.2d 1257, 1259 fn.4, (Fla. 3rd DCA 1986).

CONCLUSION

Respondent respectfully requests this Court to affirm the district court's holding in these cases.

Respectfully submitted,

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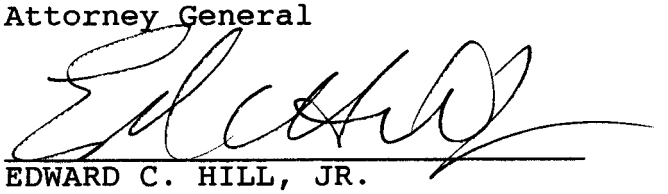

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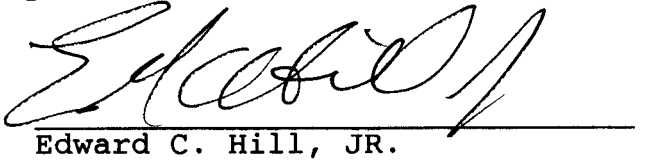
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been forwarded to Johnathan Dingus, Post Office Drawer 1209, Lake City, FL 32056-1209, and John J. Terhune, 701 South Ohio Avenue, Live Oak, FL 32060, via U. S. Mail, this 10th day of September 1990.



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