

IN THE SUPREME COURT OF FLORIDA

CASE NO.

76,331

DCA NO. 90-1316

ADOLPH LOTT,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

FILED
SOUTH FLORIDA

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[Signature]

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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IN THE SUPREME COURT OF FLORIDA

CASE NO.

ADOLPH LOTT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

INTRODUCTION

The petitioner, Adolph Lott, was the petitioner in the Third District Court of Appeal and is the defendant in the trial court where his case is presently pending. The respondent, the State of Florida, was the respondent in the Third District Court of Appeal and the plaintiff in the trial court. The parties will be referred to as they stand in this Court. The symbol "App." will be used to refer to portions of the appendix attached to this brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On May 6, 1990, petitioner was arrested and charged with sexual battery by force and kidnapping. No bond was set. On June 7, 1990, petitioner requested that he be released on his own recognizance since thirty (30) days had passed since his arrest and the State of Florida failed to file an information as required by Florida Rules of Criminal Procedure Rule 3.133(b)(6). The state indicated that no information was filed since they had not been able to locate the victim. The state informed the court that they would file an information within forty (40) days. The trial court refused to release petitioner.

On June 9, 1990, petitioner filed a writ of habeas corpus with the Third District Court of Appeal. The writ alleged that petitioner had remained in custody for over thirty (30) days without the state filing an information and without the state giving good cause why an information was not filed. (App. A).

On June 11, 1990, the Third District Court of Appeal heard argument on petitioner's writ of habeas corpus. Subsequent to the oral argument and prior to the Third District issuing an opinion on petitioner's writ of habeas corpus the State of Florida, on the fortieth day, filed an information.

After the state filed the information, the Third District Court of Appeal issued its opinion in this case. The court ruled that the state had failed to give good cause why an information had not been filed within thirty (30) days and that the petitioner was entitle to be released on his own recognizance. However, the court went on to rule that when the state filed an

information on the fortieth day the writ became moot and, therefore, the court denied the writ of habeas corpus. (App. B).

A notice to invoke discretionary jurisdiction alleging that the opinion of the Third District Court of Appeal was in conflict with Thomas v. Dyess, 15 FLW D525 (Fla. 2d DCA 1990) was filed on July 11, 1990.

QUESTION PRESENTED

THE THIRD DISTRICT COURT OF APPEAL'S DECISION
IN THIS CASE DIRECTLY CONFLICTS WITH THE
SECOND DISTRICT COURT OF APPEAL'S DECISION IN
THOMAS V. DYESS, 15 FLW D525 (FLA. 2d DCA
1990).

SUMMARY OF ARGUMENT

Florida Rules of Criminal Procedure Rule 3.133(b)(6) states that if the state fails to file an information within thirty (30) days the defendant must be released on his own recognizance pending trial. The rule allows the state an additional ten (10) days to file the information if the state establishes good cause. The rule does not state that if the state fails to file an information within thirty (30) days and fails to give good cause that the subsequent filing of an information on the fortieth day allows the state to keep a defendant incarcerated.

The Third District Court of Appeal's decision adopting the holding in Bowens v. Tyson, 543 So.2d 851 (Fla. 4th DCA 1989)¹ holds that if the state files an information after the state has violated Rule 3.133(b)(6) the defendant is not entitled to release on his own recognizance.

The opinion of the Third District Court of Appeal directly conflicts with the opinion of the Second District Court of Appeal in Thomas v. Dyess, supra which specifically held that if the state fails to file an information within thirty (30) days, the defendant must be released unless good cause is shown. The court also ruled that the subsequent filing of an information does not destroy a defendant's right to be released.

Since the Third District's Opinion is in direct conflict with Thomas v. Dyess, supra, this Court should accept jurisdiction in this case.

¹ This Court has heard argument in this case in Case No. 74,370.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE DIRECTLY CONFLICTS WITH THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN THOMAS V. DYESS, 15 FLW D525 (FLA. 2d DCA 1990).

Florida Rules of Criminal Procedure Rule 3.133(b)(6) states that if the state fails to file an information within thirty (30) days the defendant must be released on his own recognizance pending trial. The rule allows the state an additional ten (10) days to file the information if the state establishes good cause. The rule does not state that if the state fails to file an information within thirty (30) days and fails to give good cause that the subsequent filing of an information on the fortieth day allows the state to keep a defendant incarcerated.

The Third District Court of Appeal's decision adopting the holding in Bowens v. Tyson, 543 So.2d 851 (Fla. 4th DCA 1989) holds that if the state files an information after the state has violated Rule 3.133(b)(6) the defendant is not entitled to release on his own recognizance.

The opinion of the Third District Court of Appeal directly conflicts with the opinion of the Second District Court of Appeal in Thomas v. Dyess, supra. In Thomas v. Dyess, supra, the defendant was incarcerated for over thirty (30) days without the state filing formal charges.

After the thirty (30) days expired the state, without establishing good cause, filed an information. The Second District Court of Appeal held that the state's failure to file

the information within thirty (30) days was not supported by good cause. The court also ruled that the subsequent filing of an information did not render the defendant's petition for habeas corpus moot.

Therefore, the Third District Court of Appeal's decision which holds that the subsequent filing of an information after the state has violated Rule 3.133(b)(6) renders a writ of habeas corpus moot is in direct conflict with the Second District's opinion in Thomas v. Dyess, supra., which reached the exact opposite result. Therefore, this Court should accept jurisdiction in this case to resolve the conflict that exists over the interpretation of Rule 3.133(b)(6).

Reason For Granting Review In This Case

Rule 3.133(b)(6) of Florida Rules of Criminal Procedure was meant to establish a remedy for a defendant when the state fails to file an information within thirty (30) days of defendant's arrest. The Third District Court of Appeal and Fourth District Court of Appeal have held that even if the state violates Rule 3.133(b)(6), the defendant is not entitle to the relief granted in the rule if the state, subsequent to their violation of the rule, files an information.

The Second District Court of Appeal, however, has recognized that if the subsequent filing of an information allows the state to hold a defendant in jail, that Rule 3.133(b)(6) in essence, has no valid enforcement mechanism and, therefore, will not serve its intended purpose.

The issue as to what the effect of the state filing an information after they have violated Rule 3.133(b)(6) is an issue that will continuously arise in the trial court. Therefore, this Court should accept jurisdiction in this case to resolve the conflict that exists between the district courts concerning the proper interpretation of Florida Rules of Criminal Procedure Rule 3.133(b)(6).

CONCLUSION

Based on the cases and authorities cited herein, the petitioner requests this Court to accept jurisdiction in this cause.

Respectfully submitted,

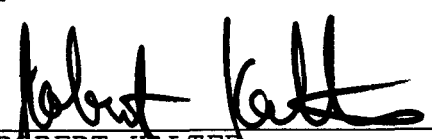
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BY: 

ROBERT KALTER
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Florida Bar No. 260711

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Angelica D. Zayas, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128 this 12th day of July, 1990.


ROBERT KALTER
Assistant Public Defender

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CIR. COURT CASE NO. 90-18206
JUDGE KAHN

DCA CASE NO.

ADOLPH LOTT,

Petitioner

-vs-

EMERGENCY WRIT OF HABEAS CORPUS

LONNIE LAWRENCE, Director
of Dept. of Corrections &
Rehabilitation,

Respondent.

_____/

Petitioner, Adolph Lott, by and through undersigned counsel,
petitions this court for a writ of habeas corpus directing that
he be released on his own recognizance and states as grounds the
following:

JURISDICTION

Petitioner is presently incarcerated in the Dade County Jail
without bond. Petitioner has been incarcerated for over thirty
(30) days and the state has not filed an information or given
good cause why an information has not been filed. Rule
3.133(b)(6) mandates that defendant be released on his own
recognizance.

This Court has jurisdiction to issue writs of habeas corpus
under Article V Section (4)(b)(3) of the Constitution of the
State of Florida and Florida Rules of Appellate Procedure, Rule
9.030(3) and 9.100.

STATEMENT OF THE CASE FACTS

1. On May 6, 1990, defendant was charged with sexual battery by force and kidnapping. No bond was set. (See App. A).

2. On June 7, 1990, defendant requested that he be released on his own recognizance since thirty (30) days had passed since his arrest and the State of Florida failed to file an information. (A copy of the transcript of the hearing has been ordered from the court reporter and will be filed with this court immediately upon receipt by this Office.)

3. The State of Florida indicated that no information was filed because the state had been unable to locate the victim.

4. Despite the fact that the state failed to establish good cause, the trial court refused to release defendant on his own recognizance and he remains incarcerated in the Dade County Jail.

ARGUMENT

PETITIONER IS BEING UNLAWFULLY DETAINED WHEN HE HAS BEEN INCARCERATED FOR OVER THIRTY (30) DAYS AND THE STATE HAS FAILED TO FILE AN INFORMATION OR GIVEN GOOD CAUSE WHY AN INFORMATION HAS NOT BEEN FILED.

Florida Rules of Criminal Procedure Rule 3.133(b)(6) states the following:

(6) *Pretrial Detention.* In the event that defendant remains in custody and has not been charged in an information or indictment within thirty 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.

Rule 3.133(b)(6) effective January 1, 1989, states that a defendant in custody, not formally charged within thirty (30) days of arrest "shall be released on [his] 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 an additional ten (10) days to file the information.

In this case, the undisputed facts establish that after thirty-two (32) days of incarceration, the defendant is still in custody and the state has not filed an information. The reason given by the state for not filing the information was that they were unable to locate the victim.

In Thomas v. Dyers, 15 F.L.W. D 525 (Fla. 2d DCA 1990) the Second District Court of Appeal recognized that there have been no cases that have discussed what constitutes "good cause" for the late filing of charges. The court, however, looked to the "exceptional circumstances" portion of the speedy trial rule for guidance. Fla.R.Crim.P. Rule 3.191(f).

If this were a speedy trial issue the fact that the state was unable to locate a witness would clearly not suffice as an exceptional circumstance. The speedy trial specifically states that lack of diligent preparation or failure to obtain available witnesses is not an exceptional circumstance which justifies extending the speedy trial rule. Fla.R.Crim.P. Rule 3.191(f).


The exact same rationale should apply to the "good cause" exception to Rule 3.133(6)(b). The purpose of Rule 3.133(b)(6) is to encourage the state to file charges promptly so that a defendant does not remain incarcerated for over thirty (30) days and then the state decides not to prosecute the case.

In the instant case, the only reason given by the state for failure to file charges is that the state has not spoken to the victim to see if formal charges are justified. At this point in time, the state has no idea whether they will ever find the victim and even if they do find the victim they have no idea whether her testimony will establish a crime.

Florida Rules of Criminal Procedure Rule 3.133(b)(6) specifically was designed to prohibit the state from keeping a defendant incarcerated under these circumstances. If the state had established that the victim was in the hospital or out of town they may have shown "good cause." However, their inability to locate the victim is not "good cause" and therefore, the trial court should have released petitioner on his own recognizance. Therefore, this court should grant the petition for habeas corpus and order that defendant be released on his own recognizance immediately.

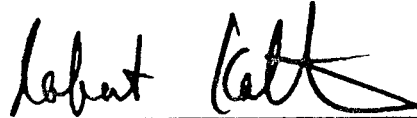
Respectfully submitted,

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BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida; and to the Office of the State Attorney, 1351 N.W. 12th Street, Room #600, Miami, Florida this 7th day of June, 1990.



ROBERT KALTER
Assistant Public Defender