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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,331

ADOLPH LOTT

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Adolph Lott, was the petitioner in the district court of appeal and the defendant in the Circuit Court. Respondent, the State of Florida, was the respondent in the district court of appeal, and the prosecution in the Circuit Court. In this brief of petitioner on the merits, the letter "R" will be used to refer to the record on apeal. 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 disretionary 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. This Court ordered that briefs on the merits be filed.

QUESTION PRESENTED

WHETHER THE STATE'S FAILURE TO FILE A TIMELY INFORMATION PURSUANT TO RULE 3.133(b)(6) ENTITLES DEFENDANT TO A RELEASE PENDING TRIAL EVEN IF THE STATE SUBSEQUENTLY FILES AN UNTIMELY INFORMATION.

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.

By allowing a defendant to remain incarcerated if the state files an information after violating Rule 3.133(6)(b), the Third District Court of Appeal has defeated the purpose of Rule 3.133(b)(6). In order for Rule 3.133(b)(6) to have any real meaning, this Court should adopt the Second District's decision in Thomas v. Dyess, 577 So.2d 196 (Fla. 2d DCA 1990) and hold that once the state violates Rule 3.133(b)(6) a defendant is entitle to release pending trial and a subsequent filing of an information should not change defendant's release status.

ARGUMENT

THE STATE'S FAILURE TO FILE A TIMELY INFORMATION PURSUANT TO RULE 3.133(b)(6) ENTITLES DEFENDANT TO A RELEASE PENDING TRIAL EVEN IF THE STATE SUBSEQUENTLY FILES AN UNTIMELY INFORMATION.

This appeal requires this Court to interpret Rule 3.133(b)(6) and determine what the remedy is for a defendant when the state violates Rule 3.133(b)(6). Florida Rules of Criminal Procedure states the following:

> (6) *Pretrial Detention*. In the event that the defendant remains in custody and has not been charged in an information or indictment within 30 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 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), requires the state to file an information within thirty (30) days if a defendant is incarcerated. The rule gives the state an additional ten (10) days to file an information only if the state shows "good cause" why an information was not filed. The rule also states that if no information was filed within thirty (30) days and the state has failed to show good cause, the defendant must be released on his own recognizance. Finally, the rule states that under no circumstances shall a defendant remain incarcerated after forty (40) days if no information has been filed.

The issue that must be resolved by this Court is what the effect of filing an information after the defendant is entitle to release has upon defendant's release status. The Third District Court of Appeal agreed with the Fourth District Court of Appeal in Bowens v. Tyson, 543 So.2d 851 (Fla. 4th DCA 1989)[1], and has held that if the state files an information after violating Rule 3.133(b)(6) a defendant is not entitle to be released on his own recognizance.

It is defendant's position that the Second District Court of Appeal's in Thomas v. Dyess, supra, correctly interprets Rule 3.133(b)(6) and should be adopted by this Court. In Thomas v. Dyess, supra, the Second District Court of Appeal recognized that if a subsequent filing of an information after the state has violated Rule 3.133(b)(6) can defeat a defendant's right to be released pending trial then Rule 3.133(b)(6) would have no enforcement mechanism and would "reduce the rule to little more than a reminder to the state to file charges in advance of any release hearing however tardy.

The Second District correctly recognized that Rule 3.133(b)(6) requires that a defendant be released from custody pending his trial if the state fails to follow the requirements of the rule and that a subsequent filing of an information should not effect defendant's release status when the court held the following:

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1 This Court has heard argument in this case and an opinon is pending in Case No. 74,370.

> 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. For example, subsection (b)(1), which entitles an uncharged defendant to an adversary preliminary hearing after twenty-one days, cautions that "[t]he subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this hearing." Further incentive to bring prompt charges is provided by subsection (b)(6)--a provision which may apply even where there has been a preliminary hearing and finding of probable cause--and while a comparable caveat is not expressly included in that subsection we believe a similar intent is clearly implied. The end result of the contrary view expressed in *Bowens* would reduce the rule to little more than a reminder to the state to file charges in advance of any release hearing, however tardy.

An analysis of the procedural history in this case establishes why the Second District's decision in Thomas v. Dyess, supra, is the only logical interpretation of Rule 3.133(b)(6).

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. 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).

The facts in this case point out why this Court should adopt the logic in Thomas v. Dyess, supra, and overrule the Third District's opinion in this case and the Fourth District's opinion in Bowens v. Tyson, supra. In this case, the state clearly violated Rule 3.133(b)(6). The rule states that when the state violates the rule, a defendant is entitle to release. The Third District's opinion resulted in defendant never being released from custody despite the state's violation of Rule 3.133(b)(6).

The purpose of Rule 3.133(b)(6) is to force the state to file informations on a timely basis. The rule contains a provision that if the state does not timely file informations, the defendant shall be released pending trial. The reason for this remedy is to encourage the state to follow the mandate of the rule. If the state can violate the rule and still prevent defendant's release by filing an information before a trial court or appellate court can order defendant's release, the rule becomes meaningless.

It is petitioner's position that this Court did not intend Rule 3.133(b)(6) to be a meaningless rule with no enforcement mechanism. In order for Rule 3.133(b)(6) to have any meaning, this Court should hold that if the state violates the rule by failing to file a timely information, the defendant is entitled to be released pending his trial regardless of whether a subsequent information is filed. Therefore, this Court should overrule the decision of the Third District Court of Appeal and adopt the holding in Thomas v. Dyess, supra.

CONCLUSION

Based upon the foregoing cases and authorities, this Honorable Court is respectfully requested to overrule the decision of the Third 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 was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida this 15th day of November, 1990.

_____
ROBERT KALTER
Assistant Public Defender