IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,331

ADOLPH LOTT,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, the State of Florida, was the respondent and Petitioner, Adolph Lott, was the petitioner in the Third District Court of Appeal. Petitioner was the defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida.

All parties will be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the state; Petitioner may also be referred to as Defendant. The symbol "R" will refer to the record on appeal.

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested on May 6, 1990, after City of Miami Police Officer Bueno observed a woman standing on a street corner completely naked in a hysterical condition claiming that she had been raped by a man later identified as Petitioner. (R. 52-55). On June 7, 1990, the thirty-second day after his arrest, Petitioner moved for release on his own recognizance pursuant to Fla.R.Crim.P. 3.133(b)(6). (R. 56-61). At a hearing to show cause why no information had been filed, the state argued that the information had not been filed because there had been difficulties locating the correct address for the

victim and claimed that the lead detective could locate the victim within the ten day grace period provided by the rule. (R. 58-60). The trial court found this reason sufficient to support Petitioner's continued detention in light of the serious nature of the charges to be filed. (R. 58-60).

On June 9, 1990, Petitioner filed an emergency petition for habeas corpus relief, alleging that he was being held illegally since the state had failed to show good cause pursuant to the rule. (R. 1-10). On June 18, 1990, the tenth day following Petitioner's motion for release, the state filed an information charging him with two counts of sexual battery, one count of attempted murder in the first degree and one count of kidnapping. (R. 62-67). On July 3, 1990, the Third District Court of Appeal held that the state had not shown good cause for the delay in filing the information, but since an information had been filed by the fortieth day, the petition for habeas relief was moot. (R. 85-86).

This petition follows.

QUESTION PRESENTED

WHETHER A DEFENDANT IS ENTITLED TO RELEASE ON HIS OWN RECOGNIZANCE PURSUANT TO RULE 3.133(b)(6) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE WHERE THE STATE FAILS TO FILE AN INFORMATION WITHIN THIRTY DAYS OF HIS INCARCERATION, BUT DOES SO UPON THE FORTIETH DAY? (RESTATED).

SUMMARY OF THE ARGUMENT

Rule 3.133(b)(6) of the Florida Rules of Criminal Procedure does not prohibit the state from arresting a defendant following the filing of an information once he has been released on his own recognizance pursuant to the rule. Accordingly, the Third District Court properly ruled that although Petitioner was entitled to release under the rule because of the state's failure to file an information within thirty days and show good cause for this failure, the issue was rendered moot by the information filed before his release.

ARGUMENT

A DEFENDANT IS NOT ENTITLED TO RELEASE ON HIS OWN RECOGNIZANCE PURSUANT TO RULE 3.133(b)(6) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE WHERE THE STATE FAILS TO FILE AN INFORMATION WITHIN THIRTY DAYS OF HIS INCARCERATION, BUT DOES SO UPON THE FORTIETH DAY. (RESTATED).

Petitioner contends that the Third District Court of Appeal erred in concluding that, although the state failed to show cause for the delay in filing an information against him, he was not entitled to release on his own recognizance because his petition for a writ of habeas corpus was rendered moot by the fact that the state filed an information upon the fortieth day. This contention raises two issues: 1) whether a defendant is entitled to release on his own recognizance if the state failed to file an information within thirty days of his incarceration, notwithstanding the fact that an information has since been filed; and 2) whether a defendant who has been released pursuant to the rule may be arrested and subjected to the ordinary procedures for determining conditions of release once an information has been filed? Respondent submits that the Third District properly determined that the petition for writ of habeas corpus became moot once the state filed an information on the fortieth day. Respondent further submits that a defendant is not entitled to release on his own recognizance once an information has been filed and that a defendant would be subject to arrest and ordinary bonding procedures if an information against him was filed after he had been released pursuant to the rule.

Rule 3.133(b)(6) provides that:

> In the event that the 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.

This rule was adopted by the Florida Supreme Court in In re Amendments to Florida Rules of Criminal Procedure, 536 So.2d 922 (Fla. 1988), and went into effect on January 1, 1989. To date, this rule has been interpreted by the appellate courts in only four published opinions, the instant case included. These cases have resulted in three distinct interpretations of the rule. See, Lott v. Lawrence, 564 So.2d 197 (Fla. 3d DCA 1990); McCaskill v. McMillan, 563 So.2d 800 (Fla. 1st DCA 1990); Thomas v. Dyess, 557 So.2d 196 (Fla. 2d DCA 1990); Bowens v. Tyson, 543 So.2d 851 (Fla. 4th DCA 1989).

In Bowens v. Tyson, the defendant was arrested on charges of first degree murder, armed robbery and possession of a short-

barreled shotgun. Forty-two days later, he filed a motion for pretrial release pursuant to rule 3.133(b)(6), alleging that he had been held in custody for more than thirty days without the filing of an information or indictment. On that same day, the state filed an information formally charging him with the crimes for which he was being held. Bowens argued that he was entitled to automatic release on his own recognizance notwithstanding the fact that an information was filed before his release. 543 So.2d at 851. The Fourth District Court of Appeal rejected Bowens's argument and stated:

> We interpret this new subsection to rule 3.133 to mean that if a defendant is held in pretrial custody for thirty days without the filing of an indictment or information , he or she has the right, on the 30th day, to move for immediate release by court. The court then has the authority to either release the defendant, or, if the state can show good cause why the information has not been filed, the court may allow ten additional days for filing of an indictment or information. We do not interpret the rule to mandate automatic release if the state files an information after the thirty day period has expired, but before the court hears the defendant's motion for release.

543 So.2d at 852. The Fourth District denied Bowens's petition for habeas corpus relief and certified the following question to the Florida Supreme Court:

> Is a defendant who is held in custody for thirty days without the filing of an information or indictment entitled to automatic pretrial release under Florida Rule of Criminal Procedure

> 3.133(b)(6), even though the state files an information before the court hears the defendant's motion for release?

543 So.2d at 852. This Honorable Court accepted jurisdiction with oral argument and the question is currently pending before the court in Bowens v. Tyson, Case No. 74,370.

Bowens is distinguished from the instant case only by the fact that the information in Bowens was filed before the trial court held a hearing to determine whether there was good cause for the delay. The information in the instant case was filed after the trial court found good cause for the delay, but before ten days had expired.

In Thomas v. Dyess, the defendant was arrested on November 20, 1989. After thirty days passed and no information had been filed, Thomas sought release on his own recognizance pursuant to rule 3.133(b)(6). An information was filed on January 2, 1990, and a show cause hearing was held on January 10, 1990. At the hearing, it was established that the delay in filing was caused by the fact that the attorney originally assigned to Thomas's case went on vacation and resigned before taking any action in the case. Matters were further complicated by the intervening holidays. 557 So.2d at 197. The Second District Court of Appeal found that the trial court erred in finding that the state attorney's "administrative problems" constituted good cause for the delay. The Second District Court

also rejected the Fourth District's interpretation of the subsection (b)(6) and stated that rule 3.133 (b)(6) "when viewed as a whole ... appears to require the state to file within a certain time period or lose the right to insist upon the defendant's continued detention." 557 So.2d at 197. The Second District concluded by stating that the "end result of the 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." 557 So.2d at 197.

In McCaskill v. McMillan, four cases were consolidated for opinion because of the similarity of the issues presented. 563 So.2d at 801. McCaskill was arrested for armed robbery and when no information was filed within 21 days, he moved for an adversary preliminary hearing pursuant to rule 3.133(b)(1). The day after McCaskill filed for relief under rule 3.133(b)(6), the state filed an information and the court held a hearing on both motions. The trial court found that probable cause existed and denied McCaskill's claim under rule 3.133(b)(1); because an information had been filed, the trial court denied McCaskill's claim under subsection (b)(6). Each of the remaining defendants (Demers, Ory and Valdez) waited 42-46 days after his arrest to petition the trial court for release pursuant to rule 3.133(b)(6). An information was filed against Valdez one day after he sought relief under the rule and informations were filed against Demers and Ory three days before they sought relief under the rule. Because informations had been filed

prior to the show cause hearings, the trial court denied relief to all three defendants. 563 So.2d at 801. On appeal, the First District Court of Appeal ruled that because McCaskill sought relief under subsection (b)(1) before he sought relief under subsection (b)(6), he was entitled to relief under subsection (b)(6).[1] 563 So.2d at 802. Because none of the three remaining defendants sought an adversary preliminary hearing pursuant to subsection (b)(1), the First District held that none was entitled to relief under subsection (b)(6). 563 So.2d at 802.

Petitioner urges this Court to adopt the analysis and interpretation of subsection (b)(6) presented in Thomas v. Dyess requiring the immediate release of a prisoner where no information has been filed within thirty days of his or her arrest. This construction is illogical because the rule, which provides that a prisoner is entitled to immediate release upon the thirtieth day unless good cause is shown, clearly contemplates that the state be given an opportunity to show cause for the delay. If a defendant is entitled to immediate release, the state would not have an opportunity to show cause for delay. The state would also be deprived of the additional ten days in which to file formal charges as granted by the rule.

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[1] McCaskill apparently asked only that the state show good cause why the information was not filed within 30 days of his arrest. Mandamus was granted as to McCaskill, but the First District Court did not clearly address whether or not McCaskill would be entitled to release on his own recognizance if the trial court found that there was no good cause for the delay.

Petitioner also argues that once the state fails to file an information within thirty days without showing good cause therefor, a prisoner is entitled to release notwithstanding the fact that an information has been filed prior to his release and that once released, a defendant's release status should not be affected by the fact that an information has been filed following his release. These arguments are also illogical.

Rule 3.133(b)(6) concludes by providing that:

> 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.

Here, the key word is "unless." Unless the defendant has been charged by information or indictment, he or she shall be released from custody. Clearly, where an information has been filed, a defendant is not entitled to release under the rule. If rule 3.133(b)(6) is interpreted to allow a defendant's immediate release after the fortieth day regardless of whether an information has been filed against him, prisoners could secure release without bail or other conditions of release by waiting until the forty-first day after his arrest to make his claim under the rule, thereby depriving the state of the right to show cause for the delay and to demonstrate that the defendant is a flight risk or danger to the community, etc.

The purpose of the rule is to prevent a defendant from languishing in jail indefinitely where no charges have been filed against him. This goal can be accomplished by giving the state an opportunity to respond to the allegation that a defendant has been held beyond thirty days without charges by showing cause for the delay, by filing charges, or by agreeing that the defendant is entitled to release. The rule is not designed to give defendants a means of bypassing the ordinary bail procedures designed to assure a defendant's presence at trial and to protect the community from a potentially violent and dangerous individual.

Rule 3.133(b)(6) does not expressly address the effect of a subsequently filed information upon the release status of a defendant who has been released pursuant to the rule and it is improper to add language to a statute which has not been expressly included.[2] See, Chafee v. Miami Transfer Co., Inc., 288 So.2d 209 (Fla. 1974); Atlantic Coast Line R. Co. v. Boyd, 102 So.2d 709 (Fla. 1958); Special Disability Trust Fund, Dept. of Labor and Employment Sec. v. Motor and Compressor Co., 446 So.2d 224 (Fla. 1st DCA 1984). However, the rule does prohibit a defendant's release once an information has been filed if the defendant is still in custody when the information is filed. It is illogical to hold that, once released, a defendant may remain

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[2] Subsections (a)(4) and (b)(5) of the rule clearly prohibit any restraint on a defendant's liberty once he has been released other than appearance at trial. Subsection (b)(6) contains no such prohibition.

at liberty even though an information has been filed against him where his counterpart, who has had the misfortune of being formally charged after thirty days have expired but before he has been released, cannot be released. It is also illogical to hold that a defendant released on technical violation of the rules may remain at liberty on his own recognizance where he would not be entitled to release on bail pursuant to Fla.R.Crim.P. 3.131(a). See, State v. Arthur, 390 So.2d 717 (Fla. 1980). (Where defendant accused of capital offense or offense punishable by life imprisonment seeks release on bail, it is within discretion of the court to grant or deny bail when proof of guilt is evident or presumption great). See also, United States v. Montalvo-Murillo, 4 F.L.W. Fed. S473 (June 1, 1990) (technical violation of Federal Bail Reform Act of 1984 does not require release of defendant who is a flight risk or danger to other persons or the community).

The rule was admittedly designed to protect the rights of criminal defendants, but in protecting these rights, the need to protect society should not be ignored. If a defendant released following a technical violation of rule 3.133(b)(6) is allowed to remain free even after an information has been filed, even the most serious offenders would remain free at the risk of the community at large. For example, a man accused of attempted first degree murder of his ex-wife may have the opportunity to complete the murder if allowed to remain at liberty after an information has been filed against him.

An interpretation of a statue or rule that leads to an unreasonable or absurd conclusion will not be adopted. Drury v. Harding, 461 So.2d 104 (Fla. 1984). Accordingly, the interpretations of rule 3.133(b)(6) advanced by the Second District Court in Thomas v. Dyess and the First District Court in McCaskill v. McMillan should be rejected in favor of the interpretation advanced by the Fourth District in Bowens v. Tyson and the Third District in the instant case.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Respondent respectfully requests that this Honorable Court answer the question presented in the negative and affirm the denial of the petition for writ of habeas corpus by 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 **BRIEF ON THE MERITS** was furnished by mail to **ROBERT KALTER**, Attorney for Petitioner, 1351 N.W. 12th Street, Miami, Florida, 33125, on this 29th day of November, 1990.

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ANGELICA D. ZAYAS