047

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 78,950

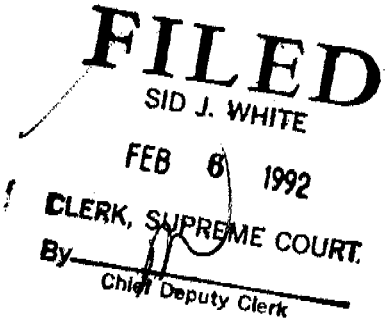
STATE OF FLORIDA,

Petitioner,

vs.

RONALD T. AGEE a/k/a RONALD LOGAN,

Respondent.



RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Ronald Agee, was the Defendant in the Circuit Court. Petitioner, the State of Florida, prosecuted him. Respondent will designate any references to the Record on Appeal, which contains the pleadings and orders filed in this cause, as "R.," followed by the appropriate page number(s). References to the transcript of the motion hearings will be "T.," followed by the appropriate page number(s). A copy of the decision of the First District Court of Appeal is attached as Appendix I.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts, but adds the following relevant facts omitted by Petitioner. Petitioner included some of the factual/legal findings by the trial court, but omitted the following:

"As the Defendant originally filed a Demand for Speedy Trial, the Court looks to Rule 3.191(a)(2) for guidance. Sub-paragraph (4) says:

> 'In the event that the Defendant shall not have been brought to trial within fifty days of the filing of the Demand, the Defendant shall have the right to the appropriate remedy as set forth in Section (i) below.'

Paragraph (i) entitled 'remedy for failure to try within the specified time,' directs this Court to make the inquiry required under Paragraph (d)(3) which provides

> 'If the trial of the accused does not commence within the period of time established by this Rule a pending Motion for Discharge shall be granted by the Court unless it is shown that (i) a time extension has been ordered under (d)(2) and that extension has not expired, or (ii) the failure to hold trial is attributal {sic} to the accused, a co-defendant in the same trial, or their counsel, or (iii) the accused was unavailable for trial under Section (e), or (iv) the Demand referred to in Section (c) is invalid.'

In considering the facts submitted in the instant cause the Court finds that (i) no time {sic} extension of time has been ordered and finds that (ii) the failure to hold the trial is not attributal{sic} to the accused, (iii) the Defendant was available for trial, and (iv) the Defendant's Demand was valid. Having made

the inquiry required by Paragraph (d)(3) the Court turns to Paragraph (i)(3) which says

> 'unless the Court finds that one of the reasons set forth in Section d(3) exists, shall order that the Defendant be brought to trial within ten days. If the Defendant is not brought to trial within the ten day period through no fault of the Defendant, the Defendant shall be forever discharged from the crime.'

The Court finally turns to Section h(2) subtitled 'Nolle Prosequi; Effect' which says

> 'The intent and effect of this Rule shall not be avoided by the State by entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode, or otherwise by prosecuting new and different charges based on the same conduct or criminal episode whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi.'"

(R. 14).

SUMMARY OF ARGUMENT

This Court should not accept jurisdiction in this cause. There is no conflict between this case and State v. Dorian, 16 FLW D2370 (Fla. 3d DCA, September 10, 1991). The Dorian court did not address the question raised by this cause: Whether the State can use the 15 day savings provision under Rule 3.191(i), Florida Rules of Criminal Procedure, in a case which the State dropped and the speedy trial time period had expired. State v.Dorian decided whether the prior Rule (without the 15 days savings provision) or the present Rule (with the 15 days savings provision) applied to a case where the offense was committed during the prior Rule, but the motion to Discharge was filed while the present Rule was in effect. Although the First District certified a conflict, it noted that State v. Dorian did not decide the same issue in this cause. Consequently, under Rules 9.030(a)(2)(A)(iv) or (vi), Florida Rules of Appellate Procedure, there is no conflict and this Court should refuse to exercise its discretionary jurisdiction.

The First District Court of Appeal and the trial court correctly decided that the State cannot use the 15 days savings provision of Rule 3.191(i), Florida Rules of Criminal Procedure, after a nolle prosequi and a subsequent refiling of the case after the expiration of the original speedy trial time. If the State can use the 15 days savings provision, then Rule 3.191(h)(2), (effect of nolle prosequi) would be meaningless. The precise purpose of Rule 3.191(h)(2) is to prevent an extension of the

speedy trial time by a nolle prosequi. The State could drop a case and then resurrect it whenever it chose to do so. The position of Petitioner removes all judicial review and control over the extension of speedy trial.

The committee note to Rule 3.191(i) state that the purpose of that Rule is to prevent the harsh remedy of automatic discharge whenever the State mistakenly calculates the speedy trial period. There was no mistake in this cause; the State consciously decided to drop the case. The State decided to abandon its prosecutorial efforts in this case. It should not be allowed to revive the case years later pursuant to Rule 3.191(i).

The State refiled this case because the victim (of a shooting) recovered from a coma and the State located some witnesses. The State emotionally argues that is unfair to deny the victim his day in court. However, the State is the party which denied the victim his day in court. The State could have saved this case by moving for an extension of speedy trial based upon exceptional circumstances under Rule 3.191(f), Florida Rules of Criminal Procedure. The State never requested such an extension in this case.

This Court cannot allow the State to decide, unilaterally, when and how the speedy trial period (through the 15 day savings provision) is revived after a nol pros. Otherwise, there is nothing to prevent the State from dropping a case near the end of a speedy trial period (due to lack of proof or diligent investigation or preparation) and then reinstating the charges whenever it suits the State's whims or desires. The whole purpose of Rule

3.191 is to give judicial control over the respective rights of the prosecution and defendant. Therefore, this Court should approve of the decision of the First District.

ARGUMENT

ISSUE I

THIS COURT SHOULD DECLINE JURISDICTION IN THIS CAUSE BECAUSE, ALTHOUGH THE FIRST DISTRICT COURT OF APPEAL CERTIFIED A CONFLICT BETWEEN THIS CASE AND State v. Dorian, 16 FLW D2370 (Fla. 3d DCA September 10, 1991), AN EXPRESS CONFLICT BETWEEN THIS CASE AND State v. Dorian, supra, DOES NOT EXIST PURSUANT TO RULE 9.030(a)(2)(A)(iv) or (vi), FLORIDA RULES OF APPELLATE PROCEDURE.

Petitioner did not address the issue of whether the First District Court of Appeal properly certified this case to this Court. This Court also postponed its final order accepting jurisdiction pending the filing of briefs. Therefore, Respondent will address the question of whether this case is properly before this Court. The First District did not note whether it certified this case to the Supreme Court pursuant to Rule 9.030(a)(2)(A)(iv) or (vi), Fla.R.App.P. Judge Allen did note that the case in the alleged conflict with this cause, State v.Dorian, supra, did not discuss the relationship between a nolle prosequi and the savings provisions in the Speedy Trial Rule - Rule 3.191(h)(2) and (i)(3), Florida Rules of Criminal Procedure. The opinion also noted that the cause relied upon in State v. Dorian also did not indicate whether the State had entered a nolle prosequi. See Bloom v. McKnight, 502 So.2d 422 (Fla. 1987); and Zabrani v. Cowart, 502 So.2d 1157 (Fla. 3d DCA 1986), decision approved, 506 So.2d 1035 (Fla. 1987).

These notations by the First District indicate that although the decision of Dorian, supra, on its face alone,

apparently conflicts with this cause, the rationale of Dorian may be different than this cause. Under these circumstances, the decision in this case does not expressly and directly conflict with the decision of the Third District on the same question of law, pursuant to Rule 9.030(2)(A)(iv), Florida Rules of Appellate Procedure. There is no indication in Dorian that the issues concerning the effect of a nolle prosequi were raised in that case. The cases relied upon in Dorian simply decided whether the old Rule (no 15 day savings provision) or the present Rule (with 15 day savings provision) applied to a case where the crime occurred when the old Rule was in effect, but the motion to discharge was considered after the enactment of the present Rule. Consequently, none of these cases directly considered the issue in this case: Whether the State can avoid the provisions of the Speedy Trial Rule and still get the 15 day savings provision after a nolle prosequi.

The decision in Dorian, supra, like those in Bloom v. McKnight, supra, and Zabrani v. Cowart, supra, also involve the question of whether the old Rule (pre-1985) or the present Rule with its 15 day savings provision applied. The crime in Dorian occurred in 1981. The case was nol prossed in 1981. Dorian was reindicted in 1991. Dorian originally filed a Motion to Discharge under the present Rule and argued that the 15 day "window" period in Rule 3.191(i)(3), Florida Rules of Criminal Procedure, was triggered. After the trial court granted an extension to the 15 day period based upon exceptional circumstances (defendant's exposure to chicken pox), Dorian filed another Motion for

Discharge; this time he argued that because his crime occurred in 1981, the 1981 Rule applied to this case and, therefore, there was no 15 day "window." The trial court granted the Motion for Discharge.

The Third District reversed the granting of the Motion to Discharge. The Court held that the filing of the Motion to Discharge is the operative event which determines which version of the Speedy Trial Rule applies. The present Rule was in effect when the motion was filed. Therefore, the State could claim the benefit of the 15 day savings provision. There is no discussion whatsoever in Dorian of the effect of the nol pros by the State. This issue apparently was not raised in Dorian. If it was, the Third District did not consider it necessary to the decision. Therefore, even if it was raised, this fact alone cannot form the basis for conflict jurisdiction. The only issue in Dorian, supra, was which Speedy Trial Rule applied - the 1981 Rule or the 1991 Rule? This type of issue is simply not present in this case. There is no conflict between this cause and Dorian pursuant to Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure. Consequently, this Court should decline jurisdiction in this case.

ISSUE II

(RESTATED) WHETHER THE STATE CAN EXTEND THE SPEEDY TRIAL PERIOD INDEFINITELY AND SUSPEND THE PROVISIONS OF RULE 3.191, FLORIDA RULES OF CRIMINAL PROCEDURE, AND USE THE 15 DAY SAVING PROVISION OF RULE 3.191(i)(3), FLORIDA RULES OF CRIMINAL PROCEDURE, BY DROPPING A CASE, AFTER RESPONDENT FILED A DEMAND FOR SPEEDY TRIAL, AND THEN REFILING THE CHARGES ALMOST TWO (2) YEARS LATER?

A. The issue in this cause.

Petitioner argues that the prosecutor has an absolute right to try a defendant within the 15 day "window-of-recapture" period in Rule 3.191(i); Petitioner also argues that there are no restrictions placed on the "window-of-recapture." (Petitioner's Initial Brief, page 11) This position completely ignores the provisions of Rule 3.191(h)(2) - Nolle Prosequi, effect. This Court must construe Rule 3.191(i) and (h)(2) together to determine if the State can extend indefinitely, without judicial approval or control, the speedy trial period by dropping a case and then resurrecting it by the use of the 15 day savings provision. An additional issue in this cause is the question of whether the State can avoid a demand for speedy trial by dropping a case and then refiling it pursuant to Rule 3.191(i).

The implications of this position by the State are profound. The State could drop a case before the end of the speedy trial period and revive the case whenever it wanted. The position of the State would remove judicial control over speedy trial (extension by the judicial finding of exceptional

circumstances). In this case, Respondent filed a Demand for Speedy Trial. Petitioner's argument also circumvents the right of an accused to demand a speedy trial.

B. An in pari materia construction of Rule 3.191(i) and 3.191(h)(2).

Rule 3.191(h)(2) notes that the intent and effect of Rule 3.191 shall not be avoided by a nolle prosequi. Consequently, the first task of this Court is to determine what is the current intent and effect of the Rule. The obvious current intent of the Rule is that a defendant be brought to trial within a certain time (unless the case is continued due to exceptional circumstances). The committee note expressly states that the 15 day savings provision is designed to prevent the previous automatic discharge. The note states:

> "In other words, it gives the system a chance to remedy a mistake; it does not permit the system to forget about time constraints."

Nothing in the committee note on Rule 3.191(i), (15 day savings provision) expressly states that the nolle prosequi provision of the Rule 3.191(h)(2) has been superseded. The committee note clearly indicates that the purpose of Rule 3.191(i) is to give the State a chance to save a case when the State mistakenly lets the speedy trial time elapse - it eliminates the prior automatic discharge.

As the First District noted, if this Court adopts the position of Petitioner, then Rule 3.191(h)(2) would become meaningless. See State v. Rheinsmith, 362 So.2d 698 (Fla. 2d DCA 1978).

Petitioner's position changes the current meaning of Rule 3.191(h)(2). Petitioner argues that a nolle prosequi does not stop the speedy trial from running. In other words, if the State drops a case, the 180 day period continues to run. Consequently, if the State refiles the case after 180 days, then it will have to use the 15 day savings provision. This argument is not persuasive because the State can effectively extend the speedy trial period by a nol pros. Assume that the State cannot prove a case and the speedy trial time is about to run. The State could drop the case and then continue to investigate it. Once the State is ready to proceed, it would decide when to refile the case. Under the State's position, the State could then save the case by the 15 day savings provision. There is no limit to how long or under what circumstances the State could decide to revive a case. The stated intent of the Rule is to prevent mistake by the State. In this case, the State did not mistakenly calculate the speedy trial time period. It consciously decided to abandon its prosecutorial efforts in this cause. Therefore, Petitioner's argument is inconsistent with the intent embodied in Rule 3.191.

Although the State in this cause refiled the case mainly due to the recovery of the victim, the State also obtained a de facto extension of time due to its inability to find witnesses. The trial court also expressly found that the State refiled the case because of its finding of two eyewitnesses. Consequently, the State may have gained a tactical advantage and it may have failed to locate the witnesses initially due to

negligence or lack of effort. The State should not be able to profit from such circumstances.

The above-described position of Petitioner ignores the duty of this Court to read Rules 3.191(i) and (h)(2) together so that the Court can remove any conflicts between them. Petitioner's argument creates such a conflict - it renders Rule 3.191 (h)(2) meaningless and permits the State to avoid the stated intent of Rule 3.191(i) - to correct mistakes in calculating the speedy trial time period. The First District construed the Rules together and found that the State could not avail itself of the 15 day savings provision because such a reading would defeat the provisions of Rule 3.191(i) and Rule 3.191(d)(2), Florida Rules of Criminal Procedure. Petitioner's position also renders Rule 3.191(d)(2) and (f) meaningless. Rule 3.191(d)(2) and (f) permits an extension of time due to specified circumstances. Rule 3.191(f) lists six detailed circumstances which will permit an extension of time.

The decision of the First District gives full effect to both Rule 3.191(i) and (h)(2). The nolle prosequi provision of Rule 3.191(h)(2) still prevents an extension of time. If the State needs an extension of time, then it can use Rule 3.191(d)(2) and (f), Florida Rules of Criminal Procedure.

C. The State could have saved the prosecution in this case by using Rule 3.191(d)(2) or (f), Florida Rules of Criminal Procedure.

Petitioner argues, by a somewhat emotion appeal, that it is unfair to discharge Respondent from this cause after the victim recovered. Respondent agrees that the charges are serious. Respondent also agrees that the State should be given the opportunity to save such cases. The State could have saved this case by obtaining an extension of time under Rule 3.191(f). Rule 3.191(f)(1) provides for an extension of time due to "unexpected illness or unexpected incapacity or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial."

As the First District noted, the advantage of Rule 3.191(f) over the State's construction of Rule 3.191(i) is that Rule 3.191(f) ensures judicial control and supervision over an extension of speedy trial. A trial court would have to make certain factual findings under Rule 3.191(f) to order/deny an extension of speedy trial. Under Rule 3.191(f), either the State or defendant could seek review of the trial court's order.

Under Petitioner's argument, the State and the State alone decides when to nol pros a case and when to refile it. This position is contrary to the goal of the speedy trial - "to promote the efficient operation of the court system and to act as a stimulus to prosecutors to bring defendants to trial as soon as practicable, thus minimizing the hardships placed upon accused persons awaiting trial." Lewis v. State, 357 So.2d 725 (Fla. 1978). If this Court accepts Petitioner's argument, then the courts will not be able to review whether the prosecutor has

adhered to the goal of the speedy trial rule as enunciated in Lewis v. State, supra.

D. The effect of Respondent being in another State.

Petitioner argues that Respondent could use the provisions of Rule 3.191 because he was in Tennessee at the time of the Motion to Discharge. Petitioner then curiously argues that the State could not apply with the Speedy Trial Rule because Respondent was out of the state. Respondent was out of the state precisely because the State of Florida dropped his case and he was returned to Tennessee. The State of Florida could have complied with the Speedy Trial Rule if it had not dropped the case against Respondent. Consequently, Respondent was not in Florida due not to his own actions, but due to the actions of the State of Florida.

Petitioner then argues that a prisoner outside the jurisdiction of Florida cannot file a Motion for Discharge under Rule 3.191(h)(1), Florida Rules of Criminal Procedure. The First District correctly decided that Rule 3.191(h)(1) simply covers the question of when a defendant is in custody for Florida speedy trial purposes. Rule 3.191(h)(1) states that a defendant is not taken into custody until he is returned to Florida and written notice is filed with the Florida court and served upon the Florida prosecutor. Rule 3.191(h)(1) does not apply to this case because Respondent was originally taken into custody in Florida and the speedy trial period began to run at that time. Rule 3.191(h)(1) does not address the questions raised in this case: An arrest in

Florida followed by a nolle prosequi followed by incarceration in another state, followed by a refiling of the Florida case while the defendant is still incarcerated in another state. If the Court rules that the State does not have the 15 day savings provision, it is a waste of time and money to return Respondent to Florida merely to have him file his Motion to Discharge while he is physically present in the state. If Respondent had not been taken into custody in Florida, then Petitioner's argument would have merit. However, it is ludicrously hypertechnical to require Respondent to return to Florida to hear his Motion to Discharge. All parties agreed that the speedy trial time has run. The only question is whether the State can use the 15 day savings provision. If the State cannot use the savings provision, there is no reason to return Respondent to Florida.

CONCLUSION

This Court should approve the decision of the First District and affirm the granting of the Motion for Discharge.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Office of the Attorney General, The Capitol Building, Tallahassee, Florida 32399-1050 this 5th day of February, 1992.

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER