IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 78,950

RONALD T. AGEE, A/K/A
RONALD LOGAN,

Respondent.

_____/

MERITS BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The petitioner, State of Florida, was the prosecuting authority in the trial court, the appellant in the First District Court of Appeal, and will be referred to here as "State." The respondent, Ronald T. Agee, a/k/a Ronald Logan, was the defendant in the trial court, the appellee in the First District Court of Appeal, and will be referred to here by his last name, Agee.

The one-volume record on appeal consisting of pleadings, etc. will be referred to by the symbol, "R," and the two-volume transcript of motion hearings by the symbol, "T," followed by the appropriate page number. A second copy of the trial court's order is included in the record on appeal, with the attachments that were inadvertently omitted initially.

STATEMENT OF THE CASE AND FACTS[1]

On February 8, 1988, Donald O. Vandyk was shot rendering him unconscious. (R. 1, 11) On February 19, 1988, the prosecutor charged Agee with attempted second-degree murder of Vandyk in Case No. 88-1867. (R. 5, 8, 11) The next day, Agee was arrested for this charge in Waukengan, Illinois, and extradition proceedings were commenced. (R. 5, 11) Agee was transported back to Florida and booked into the Duval County Jail on March 30, 1988. (R. 5, 8, 11) On April 11, 1988, he was arraigned and pled not guilty. (R. 5) Several trial dates were set between May 16, 1988 and August 15, 1988. (R. 6, 11) On July 22, 1988, Agee demanded a speedy trial within fifty days. (R. 3, 6, 8, 11) The State's motion for a continuance was granted on two occasions. (R. 12) On August 8, 1988, thirty-three days prior to expiration of the speedy trial period, the prosecutor nol prossed the charge of attempted second-degree murder. (R. 3, 8; T. 1) At this time, no eyewitnesses were available; the victim, who was still in a coma in the hospital, was not expected to recover sufficiently to testify; and Agee was wanted for escape by the State of Tennessee. (R. 12; T. 20, 30)

At some point prior to entry of the nolle prosequi, the State of Tennessee lodged a detainer against Agee with the Florida jail authorities for the crime of escape. (R. 6; T. 34-

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[1] No sworn testimony was taken in this case. Counsel for both sides made unchallenged representations to the court. The facts are developed from the documentary evidence in the record and the representations of counsel.

35) Immediately after the prosecutor nol prossed the Florida charge, Agee was rebooked by the Jacksonville Sheriff's Office as a fugitive from justice. (R. 12; T. 34) On August 19, 1988, eleven days later, Agee was transported to the State of Tennessee. (R. 9, 12; T. 15-16)

After locating two witnesses, on July 13, 1990, the State filed an information charging Agee with premeditated attempted first-degree murder in Case No. 90-8108. (R. 1, 9, 12; T. 20-21) The State conceded that the case was the same as Case No. 88-1867, except the charge was enhanced in degree. (R. 12; T. 22-23) The prosecutor lodged a detainer against Agee with the Tennessee prison authorities based on this untried charge. (R. 7, 9) Apparently Agee was scheduled to be paroled on August 21, 1990, but after the detainer was lodged, he was taken out of work release and placed in maximum security. (T. 14) Agee refused to voluntarily consent to his return to Florida. (R. 9; T. 40)

While still imprisoned in Tennessee, Agee filed two discharge motions, one in each of the above cases, on August 17, 1990 and August 24, 1990 respectively. (R. 3-4, 7, 9, 12) A hearing was held on August 24, 1990. (T. 5) On August 30, 1990, the State filed a motion to strike the second discharge motion, or, alternatively, to extend or toll the time periods established by the speedy trial rule. (R. 8-10, 12)

On September 12, 1990, the trial court rendered an order denying the first motion because the case no longer existed but granting the second motion. (R. 11-16) After reviewing

paragraphs (a)(2) and (4), (d)(3), (h)(2), and (i) of Florida Rule of Criminal Procedure 3.191, the trial court made the following findings and conclusions of law:

> Paragraph h(2) applies succinctly to the instant situation particularly in light of the failure of the State to request an extension of the speedy trial period. At the commencement of the prosecution of the 1988 case the Defendant was a prisoner in the State of Florida and would not now be in the State of Tennessee but for the State's nolle prosequi of the 1988 charge. The State cannot now invoke the provisions of Paragraph (b)(1) entitled, "Prisoners Outside Jurisdiction," to negate the provisions of paragraph (a)(2).
>
> The instant fact situation is one of first impression to this Court. It appears that the victim in this case may be deprived of his day in court because of the proper and correct operation of the Rules of Criminal Procedure. The Court notes that the present Assistant State Attorney has represented to the Court that the victim in the instant charge was so severely injured in the instant case that no one ever expected him to recover to the point of testifying in court. It seems today that the victim has done just that. Given the apparently serious condition of the victim at the time the State nol prossed the case, it is understandable that no one ever considered extending the period of speedy trial. But for whatever reason, although it appears that the victim's condition was certainly an exceptional circumstance, no request for extension was ever made.
>
> The Court has carefully considered the argument of counsel, the pleadings in both cases, and the applicable Rules. Upon all of the foregoing this Court is led inescapably to the conclusion that the Defendant's Motion to Dismiss must be granted.
>
> As it is obvious to the Court that the State may wish to appeal this decision, any

> applicable periods of speedy trial which may later be found to be in effect by the First District Court of Appeal are hereby extended by this Order pending the final outcome of any and all appellate proceedings which may arise from the entry of this Order.

(R. 15)

Thereafter, the State filed a timely notice of appeal. (R. 17) The First District Court of Appeal affirmed the trial court's discharge order, holding that Agee could move for discharge even though he was outside the jurisdiction of Florida and that the window of recapture was not available to the State because it had nolle prossed the original charge and reinstituted a charge after expiration of the speedy trial period. (See Appendix.)

The State then filed a motion for rehearing, citing State v. Dorian, 16 F.L.W. D2370 (Fla. 3rd DCA September 10, 1991), in which it asked the First District to adopt the reasoning of its sister court or, alternatively, to certify conflict with that decision. The First District denied the motion but certified conflict with the decision in Dorian. (See Appendix.)

SUMMARY OF ARGUMENT

The trial and appellate courts erred in discharging Agee from further prosecution on the charge of attempted first-degree murder. The State was denied its opportunity to recapture Agee under the remedy provision of the speedy trial rule, and Agee could not avail himself of the benefits of this rule while imprisoned in another state.

ARGUMENT

ISSUE

WHETHER THE TRIAL AND APPELLATE COURTS ERRED IN DISCHARGING THE RESPONDENT UNDER THE SPEEDY TRIAL RULE ON THE CHARGE OF ATTEMPTED FIRST-DEGREE MURDER.

The trial court erred when it discharged the respondent, Ronald T. Agee, under the state speedy trial rule, and the First District Court of Appeal erred when it affirmed the trial court's ruling. The lower courts misinterpreted at least two provisions of Florida Rule of Criminal Procedure 3.191, one relating to the effect of the entry of a nolle prosequi on the remedy provision and the other one relating to the persons falling within the scope of the rule.

It has long been established that Florida Rule of Criminal Procedure 3.191 "merely provides the procedures through which the constitutional right to a speedy trial is enforced in this state," State ex rel. Maines v. Baker, 254 So.2d 207, 208 (Fla. 1971), and that "[constitutional] speedy trial issues in state convictions will be measured by federal standards," Dickey v. Circuit Court, Gadsden County, Quincy, Fla., 200 So.2d 521, 527 (Fla. 1967).

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial ...." In Barker v. Wingo, 407 U.S. 514, 530 (1972), the Court promulgated a four-factor analysis for deciding Sixth Amendment speedy trial claims:

(1) length of the delay, (2) the reasons for the delay, (3) the assertion by the defendant of his right, and (4) the prejudice to the defendant from the delay.

The speedy trial right attaches at the time of arrest or formal charge, whichever comes first, United States v. Marion, 404 U.S. 307 (1971), and it terminates when charges are dismissed, United States v. MacDonald, 456 U.S. 1 (1982). In MacDonald, the accused was arrested by the military police and charged with murdering his wife and two children. After a military investigation, the charges were dismissed. Some four years later, the defendant was indicted by a civilian grand jury and again charged with the three murders, following which he was tried and convicted. The court of appeal held that the delay between the defendant's military arrest and his civilian trial violated his speedy trial guarantee. The Supreme Court disagreed, holding that after the military charges were dismissed, the defendant was no longer an accused, and the Sixth Amendment right to a speedy trial did not apply. It stated:

> The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.
>
> Once charges are dismissed, the speedy trial guarantee is no longer applicable. At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation . . . . Following dismissal of charges, any restraint on

> liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

Id., at 8-9.

Florida Rule of Criminal Procedure 3.191 declares that the trial of a criminal defendant must commence within a specified period of time from a specified event. The time limits range from 60 to 175 days. The event which starts the speedy trial clock running is the accused's arrest or the service of an appearance notice in lieu of physical arrest. The rule authorizes extensions of the time limit for specified reasons by stipulation or court order. A sanction is provided when the defendant by timely motion has shown that the time specified by the rule has run.

Paragraph (h)(2) of the rule, which was included in the original rule adopted in 1971, In re Florida Rules of Criminal Procedure, 245 So.2d 33, 37 (Fla. 1971), provides:

> **Nolle Prosequi; Effect.** 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**.

As previously mentioned, Rule 3.191(a) sets a mandatory time limit for the commencement of trial. Rule 3.191(h)(2) prohibits the State from defeating this time limit by entering a nolle

prosequi. Both the trial and appellate courts in the instant case reached the conclusion that the only remedy for the State's failure to try Agee within the time specified by the rule was automatic discharge. This was error.

The remedy for the State's noncompliance is set forth in paragraph (i) of the rule, which provides:

> **Remedy for Failure to Try Defendant Within the Specified Time.**
>
> (1) No remedy shall be granted to any defendant under this Rule until the court shall have made the required inquiry under section (d)(3).[2]
>
> (2) The defendant may, at any time after the expiration of the prescribed time period, file a motion for discharge.
>
> (3) No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and 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 10 days. If the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime.

The remedy provision comes into play only when the provisions of paragraph (a) of the rule, setting forth the time limits for commencement of the trial, are exceeded. When the speedy trial rule was originally adopted, the sole remedy for violation of paragraph (a) was the defendant's automatic discharge from the criminal charges. The new rule, effective

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[2] Paragraph (d)(3) addresses delay and continuances and the effect thereof on motions for discharge.

January 1, 1985, abolished that severe sanction by creating a window of recapture. In re Florida Rules of Criminal Procedure, supra; Bloom v. State, 502 So.2d 422 (Fla. 1987). No restrictions are placed on the window-of-recapture, which is triggered by the defendant's filing of a motion for discharge. The prosecution has an absolute right to try the defendant within a 15-day period, irrespective of the reasons for the delay, for this is the State's last chance to avoid the harsh sanction of discharge. The State, of course, would not be permitted to enter a nolle prosequi during the window of recapture without violating paragraph (h)(2), just as it could not nolle prosse the charge initially without violating this paragraph. The 15 days would elapse the same way the 175 days elapsed.

The above remedy of the prosecution counterbalances the severity of the provisions of the speedy trial rule in general. The rule provides only one method, as opposed to a balancing test, by which the courts of this state are to determine whether an accused's constitutional right to a speedy trial has been violated. This method is a prescribed time limit, which is not constitutionally compelled, for as the Supreme Court in Barker stated, "[There is] no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months." 407 U.S. at 523.

The most harsh provision in the speedy trial rule relates to the type of dismissal that is authorized. The trial court has no discretion whatsoever under the rule in determining whether to

dismiss the case with or without prejudice. It is not authorized to consider the seriousness of the offense, the facts and circumstances of the case leading to dismissal, or the impact of reprosecution on the administration of justice. Dismissal must be with prejudice. Compare 18 U.S.C. § 3162(a)(2) (federal speedy trial provision requires consideration of these factors in deciding whether to dismiss with or without prejudice).

At least on one occasion, this Court has been presented with a case, Zabrani v. Cowart, 506 So.2d 1035 (Fla. 1987), the facts in which are virtually indistinguishable from those in the case at bar. The defendant in Zabrani was arrested on July 11, 1984 and rearrested 269 days later on April 6, 1985. The State failed to proceed against the defendant, and at some point during this 269-day interval, the action was dismissed.[3] Approximately two weeks after being rearrested, the defendant moved for discharge under the speedy trial rule, claiming that more than 180 days had expired since his first arrest. It was undisputed that the defendant had not been brought to trial within the mandatory time limit set for commencement of the trial. The dispute occurred over the remedy to be applied. If the remedy in the old rule applied, the defendant was to be discharged forthwith, whereas if the remedy in the new rule applied, the State was to be given an

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[3] It has been represented to undersigned counsel that the defendant was released from custody five days after his arrest pursuant to a court order because of the absence of probable cause to detain him. Section 90.202(6), Florida Statutes (1991) authorizes a court to take judicial notice of its own records.

opportunity to try the defendant. The Third District Court of Appeal resolved the dispute by holding that the operative event was the filing of the discharge motion "[s]ince there was plainly no 'right to discharge' until the defendant moved for it" and that on the date the motion was filed the new rule was in effect. Zabrani v. Cowart, 502 So.2d 1257, 1259 (Fla. 3rd DCA 1986). This Court agreed with the Third District, adopting its reasoning.

The result reached in Zabrani is consistent with that reached in State v. Dorian, 16 F.L.W. 2370 (Fla. 3rd DCA September 10, 1991), the case with which the First District Court of Appeal certified conflict in the case at bar. The defendant in Dorian was arrested on May 20, 1981 for first-degree murder and rearrested some nine years later on December 5, 1990. The State nolle prossed the first charge 171 days after the defendant's arrest because of insufficient evidence and rearrested the defendant after he confessed and other evidence was obtained. The trial court granted the defendant's discharge motion on the ground that the speedy trial period had expired in 1981. Relying on Zabrani, the Third District reversed the trial court's order discharging the defendant.

The material facts in the case at bar are indistinguishable from those in Zabrani and Dorian. In all three cases, the State failed to try the defendant within the mandatory time limit set for commencement of the trial due to dismissal of the charges. In Dorian, as in the case at bar, the prosecutor's motive for

delaying the prosecution was the insufficiency of the evidence, and the motive for recharging the defendant was the discovery of new evidence based on events occurring subsequent to the dismissal of the original charge. The Zabrani opinion is silent on this point. This Court in Zabrani and the Third District Court of Appeal in Dorian held that the State was entitled to an opportunity to recapture the defendant, whereas the First District Court of Appeal in the instant case held that the defendant was entitled to automatic discharge. This Court and the Third District Court of Appeal reached the correct result; the First District here erred.

The State will now turn to a discussion of the concerns expressed by the First District Court of Appeal in its opinion, which may be of concern to this Court as well.

As previously mentioned, when a prosecutor enters a nolle prosequi, the speedy trial guarantee is no longer applicable. The person is put in the same position as anyone else who is subject to an open criminal investigation. That being the case, there is absolutely no valid reason why the prosecutor should not be permitted to nolle prosse a case because of insufficient evidence and refile charges at a later date based on the discovery of new evidence.

The above conclusion is consistent with the declaration of legislative policy set forth in section 775.15, Florida Statutes, which grants the State a specified period of time in which to commence prosecutions. The State has four years to commence

prosecution for the commission of a first-degree felony, section 775.15(2)(a), which is at issue in the case at bar. Here, the victim was shot on February 8, 1988, and less than four years later, on July 13, 1990, Agee was recharged for attempted murder. (R. 1, 9, 11, 12; T. 22-23) Legislative policy is defeated if the speedy trial rule prohibits the State from refiling charges after nolle prossing the case for insufficient evidence. This is particularly significant for the offense of first-degree murder, which was at issue in the Dorian case, for the Legislature has declared that the State may prosecute for this offense at any time.

In the case at bar, the First District Court of Appeal held "that where the requisite speedy trial period has passed and the defendant could have secured a discharge, had a nolle prosequi not been entered, the 15-day recapture period provided by Rule 3.191(i)(3) is inapplicable." (Slip Opinion, 6) It appears that the First District has assumed that the defendant would have been entitled to discharge because the State's evidence was insufficient to convict him during this time period (victim still in coma and whereabouts of eyewitnesses unknown). If so, that interpretation conflicts with the legislative policy discussed above.

The entry of a nolle prosequi does not mean that the accused is left without any constitutional protection relating to preaccusation delay. The due process clause of the Fifth Amendment, and by implication the Fourteenth Amendment, protects

the accused against oppressive preindictment delay. United States v. Lovasco, 431 U.S. 783 (1977).

The concern of the First District Court of Appeal that the State could indefinitely delay an accused's trial by entering a nolle prosequi and frustrate the mandatory time periods in the rule can be addressed in the context of an amendment to the rule after careful study of the issue. The rule, as it now stands, of course, is subject to an interpretation that would take into account the good-faith conduct of the prosecutor, like what happened in the case at bar. In federal court, this problem is addressed in at least two ways. The prosecutor must obtain leave of court to dismiss a case, Rinaldi v. United States, 434 U.S. 22, 25 fn 6 (1977), and both prosecutors and defense lawyers may be punished for willfully failing to proceed to trial without justification, 18 U.S.C.A. § 3162(b). Until the rule is amended, the accused is protected under the constitution. The State would further point out that "delays in criminal prosecution generally operate to the advantage of the accused and against the interest of the state." Dickey, supra, at 524.

Whatever concerns this Court might have in the abstract relating to prosecutorial abuse of the nolle prosequi device, it can have none in the case at bar. Here, once the charge instituted by the prosecutor was dismissed, Agee was legally and constitutionally in the same position as though no charges had been filed. Agee was a fugitive from justice, having escaped from a Tennessee prison when the alleged crime in the instant

case occurred. The State entered a nolle prosequi on August 8, 1988, and on that same date Agee was rebooked by the Jacksonville Sheriff's Office as a fugitive from justice. Eleven days later, Agee was transported to the State of Tennessee, where he was returned to prison. When the trial court entered its discharge order, Agee was still in the Tennessee prison. (R. 12)

There was no allegation at trial that the prosecutor nolle prossed the charge to evade the speedy trial rule or to gain a tactical advantage over the accused. At the motion hearing, the prosecutor, without objection, represented to the trial court that the attempted murder charge originally was nolle prossed because the victim was in a coma, from which he was not expected to recover sufficiently to testify, and there were no available eye witnesses to the crime. (R. 12) It was not until the victim miraculously recovered from his coma and two eyewitnesses were located that the prosecutor refiled charges. (R. 12; T. 20-21)

Any rule of procedure that would permit the result reached by the lower courts in the instant case is fatally defective. Agee is charged with a violent crime, attempted first-degree murder, the penalty for which is imprisonment up to thirty years. Sections 775.082(b) and 777.04(4)(a), Florida Statutes. No claim was made in the trial court that Agee was prejudiced by the delay in bringing him to trial. As recently stated by the Supreme Court, "[N]either the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls." Jones v. Thomas, 491 U.S. 376, 387 (1989). The

raison detre of the rule of procedure at issue here is to provide the mechanism for enforcing a constitutional right. It would be ironic indeed if the rule sanctioned that which the constitution eschewed. To decide in Agee's favor would give him an unjustified windfall at the expense of the victim and of society in general. Imagine the outrage the victim in this case must have felt when he awakened from a coma only to learn that the person he believed had put him there might go unpunished because of a mere technicality in the law totally unrelated to any actual harm. Indeed, Agee actually benefitted from the entry of a nolle prosequi. Imagine further the helplessness and frustration the public must feel to learn that a person believed to be of such a violent character might be released back into society on a mere technicality in the law.

What this Court said in State v. Jones, 204 So.2d 515 (Fla. 1967), albeit on a different subject, is equally applicable here:

> Under these circumstances further application of the exception will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting "the use of loopholes, technicalities and delays in the law which frequently benefit rogues at the expense of decent members of society."
>
> It has been suggested that some courts today seem to be preoccupied primarily in carefully assuring that the criminal has all his rights while at the same time giving little concern to the victim. Upon the shoulders of our courts rests the obligation to recognize and maintain a middle ground which will secure to the defendant on trial the rights afforded him by law without sacrificing protection of society. As Mr. Justice Cardozo explained in

Snyder v. Commonwealth of Mass., 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674, 687:

> "But justice, though due to the accused is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Id., at 518-519.

Having discussed the issue of the effect of the entry of a nolle prosequi on the remedy provision, the State will now proceed to a discussion of the provision relating to the persons falling within the scope of the rule. Florida Rule of Criminal Procedure 3.191(b)(1) provides that a prisoner outside the jurisdiction of Florida "is not entitled to the benefit of this Rule until that person returns or is returned to the jurisdiction of the court within which the Florida charge is pending and until written notice of this fact is filed with the court and served upon the prosecutor." See, also, State v. Bivona, 496 So.2d 130 (Fla. 1986) (prisoner incarcerated in California solely on Florida charges not entitled to benefits of state speedy trial rule until returned to Florida).

The most obvious reason for this provision is the impossibility of complying with the rule in the defendant's absence. Agee was present in Florida when he filed his demand for a speedy trial, but he was absent from Florida when he filed his motion for discharge. He, therefore, was present and available for trial when he filed the demand but not when he filed the discharge motion. The rule anticipates that a

defendant will be available for trial when both are filed. If this were not the case, the defendant could prevent the prosecution from recapturing him simply by making himself unavailable. Here, Agee refused to even consent to his transfer to Florida to stand trial on this charge. Even if Agee had consented, however, the 15-day window of recapture does not anticipate the State having to obtain physical custody of the defendant from a jurisdiction over which it has absolutely no control. The State would be at the mercy of foreign officials not subject to the laws of Florida.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to quash the decision of the First District Court of Appeal affirming the trial court's order discharging Agee from further prosecution for attempted first-degree murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to James T. Miller, Assistant Public Defender, 407 Duval county Courthouse, Jacksonville, Florida, 32202, this 17th day of January, 1992.

Carolyn J. Mosley

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 78,950

RONALD T. AGEE, A/K/A
RONALD LOGAN,

Respondent.

_____/

APPENDIX

90-111764
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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, Appellant,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.
vs.	)	CASE NO. 90-2952
RONALD T. AGEE, a/k/a, RONALD LOGAN, Appellee.	)	

Opinion filed August 27, 1991.

Appeal from the Circuit Court for Duval County, Michael R. Weatherby, Judge.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellant.

Louis O. Frost, Jr., Public Defender, and James T. Miller, Assistant Public Defender, Jacksonville, for Appellee.

ALLEN, J.

The state appeals from an order discharging the appellee under Florida Rule of Criminal Procedure 3.191, the speedy trial rule. Because we conclude that the trial court correctly applied the rule to the unique facts of this case, we affirm the order of discharge.

The appellant was taken into custody on March 30, 1988, under an information charging him with attempted second degree murder. On July 22, 1988, he filed a written demand for speedy trial under Rule 3.191(a)(2). Then, on August 8, 1988, the state entered a nolle prosequi. Because the state of Tennessee had previously filed a detainer on the appellee, he was extradited to Tennessee on August 19, 1988. He was still a prisoner in Tennessee when the order under review was entered.

Almost two years later, on July 13, 1990, the state filed an information charging the appellee with attempted first degree murder. The state conceded that the new information was grounded upon the same conduct or episode which gave rise to the 1988 information. On August 24, 1990, the appellee filed his motion for discharge under Rule 3.191. On August 30, 1990, the state filed a motion arguing that the time allowed by the speedy trial rule had not elapsed and requesting an extension of time under the rule. This appeal is from the order granting discharge, but also providing, "any applicable periods of speedy trial which may later be found to be in effect by the First District Court of Appeal are hereby extended by this Order pending the final outcome of any and all appellate proceedings which may arise from the entry of this Order."

Whether the appellee's speedy trial time had been computed under 3.191(a)(1) or 3.191(a)(2), the appellee could have filed his motion for discharge during September of 1988, had the nolle prosequi not been entered. Had the nolle prosequi not precluded

the motion, the state would have been obligated to bring the appellee to trial within 15 days following the filing of the motion or suffer a discharge of the appellee under 3.191(i)(3). But the rule's timetable was interrupted by the state's entry of the nolle prosequi. Recognizing this, the trial court determined that 3.191(h)(2) is the dispositive provision of the rule. It provides:

> Nolle Prosequi; Effect. 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.

The rationale for this provision is obvious. The objective of the speedy trial rule is to insure, absent certain specified circumstances, that defendants will be brought to trial within the time periods prescribed by the rule. If prosecutors were permitted to unilaterally suspend the prescribed periods simply by use of the nolle prosequi, the rule would be meaningless. See State v. Rheinsmith, 362 So.2d 698 (Fla. 2d DCA 1978). Nevertheless, the state advances several arguments in support of its contention that the trial court erred in discharging the appellee.

First, the state argues that 3.191(b)(1) deprives the appellee of any right to discharge. It provides as follows:

> Prisoners Outside Jurisdiction. A person who is in federal custody or

> incarcerated in a jail or correctional institution outside the jurisdiction of this State or a subdivision thereof, and who is charged with a crime by indictment or information issued or filed under the laws of this State, is not entitled to the benefit of this Rule until that person returns or is returned to the jurisdiction of the court within which the Florida charge is pending and until written notice of this fact is filed with the court and served upon the prosecutor. For such persons, the time period under (a)(1) commences on the date the last act required under this section occurs. For such persons the time period under (a)(2) commences when the demand is filed so long as the acts required under this section occur prior to the filing of the demand. If the acts required under this section do not precede the filing of the demand, then the demand is invalid and shall be stricken upon motion of the prosecuting attorney. Nothing hereinabove stated shall affect a prisoner's right to speedy trial under section 941.45-941.50, Florida Statutes(1979).

Although the state contends that the foregoing provision means that a motion for discharge filed by an out-of-state prisoner is a nullity, it refers us to no authority for that construction of the provision. We do not agree with the construction urged by the state.

Rule 3.191(b)(1) simply means that one who is incarcerated outside Florida, and who is charged with a crime by indictment or information in Florida, is not "taken into custody" for purposes of the speedy trial rule, 3.191(a)(4), until he is returned to Florida and written notice of his return is filed with the Florida court and served upon the Florida prosecutor. Once a defendant has been taken into custody, (b)(1) has no further relevance. It does not address the effect of a subsequent

incarceration of a defendant in another jurisdiction. Compare Lewis v. State, 357 So.2d 725 (Fla. 1978)(giving analogous construction to similar former provision of the rule). We do not suggest that the speedy trial rule may not be extended, under appropriate circumstances, due to a defendant's incarceration in another jurisdiction during the running of the speedy trial period, but that must be accomplished under 3.191(d), not 3.191(b)(1). See State v. Wilson, 498 So.2d 918 (Fla. 1986).

The state next argues that under 3.191(i)(3), it had 15 days following the filing of the motion for discharge to bring the appellee to trial and, because it secured an extension of time within that 15 days, the speedy trial period has not yet run. Rule 3.191(i)(3) provides:

> No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and unless the court finds that one of the reasons set forth in (d)(3) exists, shall order that the defendant be brought to trial within 10 days. If the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime.

The state's argument has some appeal when the foregoing provision is considered in isolation. However, when it is considered in the context of the complete rule, the argument must be rejected.

Rule 3.191(d)(2), relating to extensions of time under the rule, contemplates that extensions of time will be authorized only upon court order or stipulation of the parties. Were we to accept the state's suggested application of 3.191(i)(3) to the

facts of this case, prosecutors would have unilateral authority under the rule to secure extensions for as long as they wished. This would conflict with the approach set forth in (d)(2). Indeed, it would conflict with the basic reasons for adopting the speedy trial rule.

"Our speedy trial rule was promulgated in order 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, 727 (Fla. 1978). If we should accept the state's argument that 3.191(i)(3) allows the phoenix-like rebirth of a case years after entry of a nolle prosequi, the critical stimulus referred to in Lewis would be lost. A prosecutor nearing the end of the speedy trial period, but wishing to delay the trial, could enter a nolle prosequi, take the additional months or years desired, and then file a new information. The prosecutor would merely be required to commence the trial within 15 days following the refiling of the charges.

As was discussed above, (h)(2) of the rule was adopted for the purpose of avoiding this result, and the trial court was correct in determining that (h)(2) required the discharge of the appellee. We hold that where the requisite speedy trial period has passed and the defendant could have secured a discharge, had a nolle prosequi not been entered, the 15-day recapture period provided by Rule 3.191(i)(3) is inapplicable.

In so holding, we do not simply choose between conflicting provisions of the speedy trial rule. In our view, 3.191(i)(3) was never intended to apply to the situation before us. Before the provision was added to the rule in 1984, defendants with active cases were sometimes able to secure discharges because prosecutors overlooked speedy trial deadlines. In order to avoid the automatic discharge provided for in the pre-1984 rule, the current rule provides a reminder to the prosecutor that speedy trial is about to run. Therefore, the present rule continues to insure that a diligent defendant will be brought to trial within the periods provided in the rule, but it avoids the sometimes draconian remedy of automatic discharge following mere prosecutorial oversight.

The case before us does not involve prosecutorial oversight in failing to timely bring an active case to trial. Rather, it involves a conscious decision by the prosecutor to enter a nolle prosequi, followed by the prosecutor's conscious decision, almost two years later, to reinstate the case. Rule 3.191(i)(3) was not adopted to aid such a prosecutor, and we decline to so apply it in this case.

Finally, the state argues that the nolle prosequi was entered in good faith, and not merely for purposes of delay. The state explains that when the nolle prosequi was entered, the alleged victim was in a coma and not expected to recover, and there were no other eyewitnesses; but, when the case was refiled two years later, the alleged victim had recovered and two other

eyewitnesses had been found. The argument is that because the state could have secured an extension of the speedy trial time, rather than entering the nolle prosequi, it should not now be penalized for choosing "the more humane and ethical approach." We must reject this final argument as well.

The speedy trial rule contains no "good faith" exception. But it does provide for extensions of the speedy trial period upon stipulation of the parties or order of the court. See 3.191(d)(2) and (f). In light of the circumstances existing in August of 1988, the state had only one option under the rule which would reserve its right to proceed against the appellee in the future. That was to secure an order extending speedy trial due to exceptional circumstances. When the state chose to enter a nolle prosequi, rather than move for an order extending the speedy trial period, the state effectively abandoned the case. That abandonment could not be altered by the unanticipated events of the ensuing months and years.

Accordingly, the order discharging the defendant is affirmed.

ERVIN and SMITH, JJ., CONCUR.

G
9-11-91

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 90-2952

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

Appellee.
_____/

Docketed
9-12-91
Florida Attorney
General

APPELLANT'S MOTION FOR REHEARING

In accordance with Florida Rule of Appellate Procedure 9.330(a), the appellant, State of Florida, respectfully moves the court for rehearing on the decision in this case and shows the court as follows:

1. In its opinion, this court stated:

> We hold that where the requisite speedy trial period has passed and the defendant could have secured a discharge, had a nolle prosequi not been entered, the 15-day recapture period provided by Rule 3.191(i)(3) is inapplicable.

Slip Opinion, 6.

Yesterday, the Third District Court of Appeal released its opinion in State v. Dorian, Case No. 91-1407, a copy of which is attached. The decision in that case is in conflict with this court's decision in the instant case. The facts are set out as follows: In 1981, the defendant was arrested and indicted for first-degree murder. The State nol prossed the charges 171 days

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later because it could not locate its witnesses. Some six years later, the defendant confessed to the crime, and he was reindicted. Thereafter, he moved for discharge on four occasions. The first time he moved for discharge for the sole purpose of triggering the 15-day window of recapture. The second time expressly and third time, by implication, he moved for discharge because the State did not bring him to trial within the 15-day window of recapture. The fourth time, he moved for discharge on the ground that the speedy trial period had expired in 1981. The trial court granted this last motion, finding that the dispositive factor was the expiration of the speedy trial period in 1981 under the old rule, not the filing of the motion for discharge in 1991 under the new rule. The Third District reversed the trial court stating:

> As the State properly contends, the trial court erred in granting the defendant's motion for discharge. The Supreme Court of Florida in Bloom v. McKnight, 502 So.2d 422, 423 (Fla. 1987), stated that the filing of the motion for discharge is the "operative event" which determines which version of the speedy trial rule applies. See, also, Zabrani v. Cowart, 502 So.2d 1035 (Fla. 1987). In the instant case, the rule in effect at the time the motion for discharge was filed was the revised speedy trial rule which provides for the window period. Therefore, the trial court erred in granting the defendant's motion for discharge based on its conclusion that the revised speedy trial rule was not applicable. Accordingly, the trial court's May 28, 1991 order discharging the defendant is hereby reversed.

Slip Opinion, 4.

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While the Third District was not as explicit in announcing its holding in Dorian, as this court was in the instant case, nevertheless, the Third District's decision clearly conflicts with the decision in the case at bar. Prior to 1985, an accused was absolutely discharged from prosecution if the time provisions were violated. The Florida Bar, 389 So.2d 610, 612 (Fla. 1980). In Dorian, the State nol prossed the case nine days before the speedy trial period expired, and here the prosecutor nol prossed the case thirty-three days prior to expiration of the speedy trial period. In Dorian, upon motion for discharge, the defendant would have been entitled to automatic discharge. Here, upon motion for discharge, the defendant would have been entitled to discharge if the State failed to bring him to trial within fifteen additional days. The prosecutor there, as here, nol prossed the case for lack of evidence, and the prosecutor there, as here, refiled charges upon obtaining the needed evidence several years later. Implicitly the Dorian court has held that under the facts of that case, the prosecutor did not nol prosse the case to defeat the purpose of the speedy trial rule. The reason for the nolle prosse there, of course, is identical to the reason for the nolle prosse in the case at bar.

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WHEREFORE, the State would ask the court to reconsider its decision in light of Dorian, and adopt that court's reasoning, or, alternatively, to certify conflict with Dorian.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion entitled, "Appellant's Motion for Rehearing" has been furnished by U.S. Mail to Mr. James T. Miller, Assistant Public Defender, Fourth Judicial Circuit, 407 Duval County Courthouse, Jacksonville, Florida, 32202, this 11th day of SEPTEMBER, 1991.

Carolyn J. Mosley
Assistant Attorney General

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1991

THE STATE OF FLORIDA, **

Appellant/Cross-Appellee, **

vs. ** CASE NO. 91-1407

TODD RICHARD DORIAN, **

Appellee/Cross-Appellant. **

Opinion filed September 10, 1991.

An Appeal from the Circuit Court of Dade County, Alfonso C. Sepe, Judge.

Robert A. Butterworth, Attorney General, and Julie S. Thornton, Assistant Attorney General; Janet Reno, State Attorney and Lisa Berlow-Lehner, Assistant State Attorney, for appellant/cross-appellee.

Bennett H. Brummer, Public Defender and Bruce A. Rosenthal, Assistant Public Defender, for appellee/cross-appellant.

Before HUBBART, FERGUSON and GODERICH, JJ.

PER CURIAM.

The State appeals the trial court's May 28, 1991, order discharging the defendant, Todd Richard Dorian, for violation of the speedy trial rule. We reverse.

On May 20, 1981, the defendant was arrested for first degree murder. On June 10, 1981, the defendant was indicted. On November 7, 1981, 171 days after the defendant's arrest, the State nolle prossed the charges because it could not locate its witnesses.

Approximately six years later, the defendant confessed to the murder. Based on the defendant's confession, the State reopened the murder investigation. Thereafter, the defendant was reindicted by a grand jury. On December 5, 1990, the defendant was rearrested on the charges stemming from the murder.

On April 18, 1991, approximately four months after the defendant was reindicted, the defendant moved for discharge pursuant to the speedy trial rule. On April 23, 1991, the trial court conducted a hearing on the defendant's motion. At that time, the defendant stated that the purpose of the motion was to trigger the fifteen-day "window period" contained in Rule 3.191(i)(3), Florida Rules of Criminal Procedure.[1] The State

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[1] Section 3.191(i)(3) reads as follows:

> No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and 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 10 days. If the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime.

agreed that the defendant should be brought to trial within 10 days. Trial was set for April 29, 1991.

On April 29, 1991, the defendant was not transported to the courthouse for trial because there was a quarantine for chicken pox that existed at the Dade County Jail. On May 1, 1991, within the window period, the trial court conducted a hearing as to the defendant's availability for trial. The trial court ruled that the defendant would not be available until May 12, 1991, due to his exposure to chicken pox. As a result, the trial court tolled the running of the speedy trial period. Additionally, on April 29, 1991, the defendant moved for discharge based on the violation of his right to a speedy trial. Once again, the defendant stated that the pre-1985 speedy trial rule, which mandates automatic discharge upon the filing of the motion, was no longer applicable. The trial court denied the motion.

During the week of May 13, 1991, the defendant's motion to suppress his confession was litigated. Ultimately, on May 17, 1991, the defendant's motion to suppress was denied. On May 15, 1991, the jury panel was sworn and voir dire commenced. On May 17, 1991, the defendant moved to be discharged arguing that the window period had elapsed several days prior to May 15th. The trial court denied the motion on May 21, 1991.

On May 28, 1991, the defendant filed another motion for discharge arguing that the revised speedy trial rule, which became effective on January 1, 1985, was not applicable, and therefore the State was not entitled to the window period. The trial court granted the motion for discharge ruling that the

dispositive factor was the expiration of the speedy trial period in 1981, not the filing of the motion for discharge in 1991, and therefore, the revised speedy trial rule was not applicable.

As the State properly contends, the trial court erred in granting the defendant's motion for discharge. The Supreme Court of Florida in Bloom v. McKnight, 502 So.2d 422, 423 (Fla. 1987), stated that the filing of the motion for discharge is the "operative event" which determines which version of the speedy trial rule applies. See also, Zabrani v. Cowart, 502 So.2d 1257 (Fla. 3d DCA 1986), decision approved, 506 So.2d 1035 (Fla. 1987). In the instant case, the rule in effect at the time the motion for discharge was filed was the revised speedy trial rule which provides for the window period. Therefore, the trial court erred in granting the defendant's motion for discharge based on its conclusion that the revised speedy trial rule was not applicable. Accordingly, the trial court's May 28, 1991, order discharging the defendant is hereby reversed.

The point raised by the defendant in the cross-appeal lacks merit.

Accordingly, we reverse as to the main appeal, affirm as to the cross-appeal, and remand for further proceedings.

Eb

90-111764-TCR

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

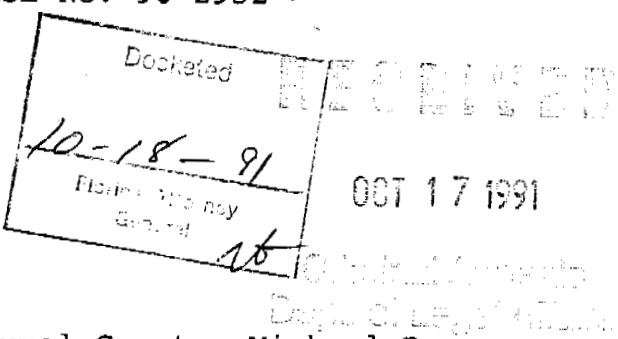
Appellant,

v.

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

Appellee.

* NOT FINAL UNTIL TIME EXPIRES TO
* FILE MOTION FOR REHEARING AND
* DISPOSITION THEREOF IF FILED.
*
* CASE NO. 90-2952



Opinion filed October 16, 1991.

Appeal from the Circuit Court for Duval County, Michael R. Weatherby, Judge.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellant.

Louis O. Frost, Jr., Public Defender, and James T. Miller, Assistant Public Defender, Jacksonville, for Appellee.

ON MOTION FOR REHEARING

ALLEN, J.

We deny the appellant's motion for rehearing, but we certify conflict between our decision herein and State v. Dorian, 16 F.L.W. D2370 (Fla. 3d DCA September 10, 1991). Although the material facts in Dorian are indistinguishable from those present in this case, we observe that Dorian does not discuss the

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relationship between subsections (h)(2) and (i)(3) of Rule 3.191, Florida Rules of Criminal Procedure. We also observe that the reported facts of the two decisions relied upon by the Dorian court, Bloom v. McKnight, 502 So.2d 422 (Fla. 1987), and Zabrani v. Cowart, 502 So.2d 1257 (Fla. 3d DCA 1986), decision approved, 506 So.2d 1035 (Fla. 1987), do not indicate that a nolle prosequi was involved in either case.

ERVIN and SMITH, JJ., CONCUR.