IN THE SUPREME COURT OF FLORIDA

ERVIN E. WILLIAMS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 79,976

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0377228
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

ERVIN E. WILLIAMS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.

STATEMENT OF THE CASE AND FACTS

The following statement of case and facts, excepting the final paragraph, is taken from the State's Initial Brief filed in the District Court of Appeal on January 24, 1992.

Appellee, Ervin Eugene Williams, was arrested on March 22, 1991. (R 3,57) Appellee was charged with having committed a burglary of a dwelling, petit theft, and dealing in stolen property between March 1, 1991 and March 5, 1991, and an information was filed on April 11, 1991. (R 28-30) Appellee was arraigned on April 16, 1991 in Case Number CR 91-3192 before the Honorable Richard Conrad of the Ninth Judicial Circuit for Orange County. (R 31) Appellee pled not guilty and trial was set for August 19, 1991. (R 31) A Public Defender was appointed to represent Appellee. (R 31) The State Attorney's Office filed a Notice of Intention to Seek Enhanced Punishment on June 5, 1991.

(R 36)

On September 3, 1991, the State appeared before the Honorable Judge Sprinkel and asked for a one-day continuance, which at that time was well within the time period for speedy trial. (R 6-7) The State had subpoenaed all of its witnesses but was unable to contact one of the key witnesses over the Labor Day weekend to make sure that he showed up for the trial. The State asked for the one-day continuance so they could send an investigator to the witness' workplace. Judge Sprinkel denied the request. (R 6) The State nolle prossed the case, since it could not contact its key witness. (R 6) The State went on the record as stating it nolle prossed the case and then refiled it because it had no other choice. (R 6-7)

The State filed a Nolle Proseque on September 3, 1991. (R 37) On September 12, 1991, Appellee's speedy trial period expired. (R 3) Appellee did not make a demand for speedy trial since the case had been nolle prossed on September 3, 1991. (R 3) On September 16, 1991, the State refiled the information charging Appellee with Burglary of a Dwelling, Petit Theft, and Dealing In Stolen Property. (R 38-40) A capias was issued for Appellee on September 16, 1991, (R 47,51), and Appellee was again arrested on September 26, 1991. Appellee was again arraigned on October 2, 1991 in Case Number CR 91-9863, in front of the Honorable Judge Formet. (R 52) Appellee pled not guilty and a Public Defender was appointed. (R 52) Appellee filed a motion to discharge on October 8, 1991. (R 54-55) Trial was set for

October 21, 1991, within the fifteen-day "window" remedy provided by Rule 3.191(i)(3), Florida Rules of Criminal Procedure. (R 60-61) A motion for discharge hearing was held on October 21, 1991 before the Honorable Judge Hauser at which time the trial court granted the motion for discharge. (R 58) An amended order of dismissal was filed on November 7, 1991 by Judge Hauser, nunc pro tunc October 21, 1991. (R 60-61) Judge Hauser held that the 15-day window does not apply where the State nolle prossed the case and then refiled it after speedy trial period has run. (R 20,60-61)

On appeal the Fifth District Court of Appeal reversed. State v. Williams, 17 FLW D1110 (Fla. 5th DCA May 1, 1992). The court noted the trial judge's reliance on State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991), and quoted the language from Agee upon which Mr. Williams was relying. However, the court interpreted Zabrani v. Cowart, 502 So.2d 1257 (Fla. 3d DCA 1986) as consistent with the approach advocated by the State. The court rejected Agee and chose to follow Zabrani. Mr. Williams filed a timely notice to invoke the discretionary jurisdiction of this Court, served on June 1, 1992. This brief follows.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court in this case is clearly in conflict with State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991). The District Court quoted extensively from Agee but rejected its holding. Acceptance of jurisdiction is appropriate, especially in view of the fact that Agee is already pending review.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IN THE INSTANT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN STATE V. AGEE, 588 SO.2D 600 (FLA. 1ST DCA 1991).

The District Court's decision in this case is clearly in express and direct conflict with State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991). The District Court's opinion recognizes Agee as contrary authority. In its Initial Brief to the District Court of Appeal the State made no attempt to distinguish Agee, but argued only that the decision was not correct. Clearly the State would have lost its appeal had the Fifth District Court of Appeal decided to follow Agee.

This Court should accept discretionary jurisdiction in this case to maintain uniformity of decisions throughout the State in this important area of the law. Fairness and expediency would dictate acceptance of jurisdiction where the Court has already agreed to hear State v. Agee, Florida Supreme Court Case Number 78,950 (oral argument set for October 6, 1992).

CONCLUSION

BASED UPON the foregoing arguments and the authorities cited herein, Petitioner respectfully requests that this Court accept discretionary jurisdiction in this cause.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0377228
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Ervin E. Williams, 1247 Kozart Street, Orlando, FL 32811, this 11th day of June, 1992.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ERVIN E. WILLIAMS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.

A P P E N D I X

State v. Williams
17 FLW D1110 (Fla. 5th DCA May 1, 1992)

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0377228
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

90.803(23)(b) to assess the reliability of the hearsay. Luszczyk v. Department of Health & Rehabilitative Services, 576 So. 2d 431 (Fla. 5th DCA 1991).

* * *

Civil procedure—Trial court lacked jurisdiction to enter default judgment against non-resident defendant where complaint was totally devoid of any allegation that would support exercise of jurisdiction and entry of judgment by Florida court

PLUESS-STAUFER INDUSTRIES, INC., Appellant, v. ROLLASON ENGINEERING & MANUFACTURING, INC., Appellee. 5th District. Case No. 91-1504. Opinion filed May 1, 1992. Appeal from the Circuit Court for Seminole County, Robert B. McGregor, Judge. Michael M. Bell and Andrew J. Leeper of Hannah, Marsee, Beik & Voght, Orlando, for Appellant. Bruce W. Flower, Maitland, for Appellee.

(GRIFFIN, J.) This is the appeal of an order denying a Motion for Relief from a default judgment entered against appellant Pluess-Staufer Industries ("PSI"). The principal issue on appeal is whether appellee Rollason Engineering & Manufacturing, Inc. ("Rollason") alleged sufficient jurisdictional facts in the complaint to permit the lower court to exert personal jurisdiction over PSI.[1]

Under Florida law, even the entry of a default judgment against a nonresident defendant cannot prevent assertion of lack of personal jurisdiction over a defendant when the complaint lacks sufficient jurisdictional allegations to bring the claim within the ambit of the long arm statute. *Mouzon v. Mouzon*, 458 So.2d 381 (Fla. 5th DCA 1984), *accord, Arthur v. Arthur*, 543 So.2d 349 (Fla. 5th DCA 1989). Without a basis for jurisdiction appearing in the complaint and any attachments, service of long-arm process is void and any judgment obtained is also void. *Plummer v. Hoover*, 519 So.2d 1158 (Fla. 5th DCA 1988); *International Harvester Co. v. Mann*, 460 So.2d 580 (Fla. 1st DCA 1984), *Dimino v. Farina*, 572 So.2d 552 (Fla. 4th DCA 1990); *Kennedy v. Reed*, 533 So.2d 1200 (Fla. 2d DCA 1988).

The complaint in this case affirmatively alleged that PSI was a Vermont corporation (with a Vermont statutory agent for service of process) against whom Rollason was seeking indemnity for a lawsuit filed in New Jersey. It is totally devoid of any allegation from which any basis whatsoever for jurisdiction could be gleaned or even inferred. This complaint could not support exercise of jurisdiction and entry of a judgment by a Florida court. The trial court should have set aside the default judgment and allowed Rollason to amend its complaint to plead its basis for jurisdiction.

REVERSED and REMANDED. (SHARP, W. and DIAMANTIS, JJ., concur.)

---

[1]In fairness to the trial court we note that the principal issue argued on appeal and on which we reverse was only *barely* raised below by motion. The controlling authorities on the issue were not brought to the trial court's attention. Had the issue been appropriately presented to the trial court, a great deal of the parties' expense and the courts' time would likely have been saved.

* * *

Criminal law—Motion for release of personal property being held by police department improperly denied where only evidence before court was that property belonged to movant and that the police would not release the property without a court order

WILLIAM E. SHEARER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-2145. Opinion filed May 1, 1992. Appeal from the Circuit Court for Orange County, Daniel P. Dawson, Judge. William E. Shearer, Arcadia, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) The trial court entered an order denying the appellant's petition for the release of his personal property which was being held by the Orlando Police Department. The court held that it did not have jurisdiction over the release of personal property held by law enforcement officers. The appellant claims that the only evidence before the court was that this property belonged to him and that the police would not release the property without a court order. We agree that the court's order of denial has left the appellant with no available remedy.

Accordingly, the trial court's order denying the appellant's motion for release of personal property is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED. (HARRIS and PETERSON, JJ., concur.)

* * *

Criminal law—Speedy trial—Where state entered nolle prosequi, recharged defendant, and failed to bring him to trial within 190 days of his arrest, state nevertheless had fifteen days from date defendant filed his motion to discharge within which to bring defendant to trial—Error to grant motion for discharge where trial date was set thirteen days after motion to discharge was filed following defendant's rearrest—Running of fifteen-day recapture period cannot be tolled by filing of nolle prosequi

STATE OF FLORIDA, Appellant, v. ERVIN EUGENE WILLIAMS, Appellee. 5th District. Case No. 91-2501. Opinion filed May 1, 1992. Appeal from the Circuit Court for Orange County, James C. Hauser, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and Daniel J. Schafer, Assistant Public Defender, Daytona Beach, for Appellee.

(COBB, J.) The issue in this case is the applicability of the 15-day recapture period in Florida's speedy trial rule[1] after the state has entered a *nolle prosequi*, recharged the defendant, and failed to bring him to trial within 190 days of his initial arrest.

Subsection (h)(2) of Rule 3.191 provides:

> (2) *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.

Based on the foregoing provision and the case of *State v. Agee*, 588 So.2d 600 (Fla. 1st DCA 1991), the trial court rejected the state's reliance on this 15-day recapture period and discharged the defendant even though his trial date was set 13 days after his motion to discharge was filed following his rearrest. In *Agee* the court said:

> [4] "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.
>
> [5] 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.

The converse argument is set forth by the majority opinion of Judge Schwartz in *Zabrani v. Cowart*, 502 So.2d 1257 (Fla. 3d DCA 1986), an opinion which has twice been approved by the Florida Supreme Court.[2] Therein, it was pointed out that the grace period added to the speedy trial rule, effective January 1, 1985, changed the analysis of the rule: the "operative event" which triggers a defendant's right to discharge is no longer simply the running of a prescribed period of time but rather the filing

by that defendant of a motion for discharge. Presumably, once that motion is filed subsequent to the expiration of the 175 day period, the defendant has the right to either be tried during the recapture period or discharged. The state cannot toll the running of the recapture period by the filing of *nolle prosequi* because of the provisions of Rule 3.191(h)(2).

Accordingly, we reverse and remand for trial of the defendant, Ervin Williams.

REVERSED AND REMANDED. (GOSHORN, C.J. and HARRIS, J., concur.)

---

[1]*See* Fla.R.Crim.P. 3.191(i).

[2]*See Zabrani v. Cowart*, 506 So.2d 1035 (Fla. 1987); *Bloom v. McKnight*, 502 So.2d 422 (Fla. 1987).

* * *

Dissolution of marriage—Child custody—Permanent termination of mother's visitation rights based upon finding that mother was clear and present danger to either kidnap or otherwise physically harm child supported by extensive history and record

EVELYN HAYS, Appellant, v. STEVEN HAYS, Appellee. 5th District. Case No. 91-795. Opinion filed May 1, 1992. Appeal from the Circuit Court for Marion County, Ernest C. Aulls, Jr., Judge. Evelyn Hays, Albertville, Alabama, pro se. M. Thomas Bond, Jr. of Bond, Arnett & Phelan, P.A., Ocala, for Appellee.

(PER CURIAM.) In this case, the trial court permanently terminated the mother's visitation rights with her child after finding that the mother was a clear and present danger to either kidnap or otherwise physically harm the child. The trial court's finding is amply supported by the extensive history and record in this case.

AFFIRMED. (GOSHORN, C.J. and DIAMANTIS, J., concur. COWART, J., dissents with opinion.)

(COWART, J., dissenting.) The natural mother appeals a final order permanently terminating her visitation rights with her child, prohibiting any further contact by the mother with the child in any manner or form, and awarding sole parental responsibility for the child to the natural father.

The effect of the court's order is to essentially terminate the mother's parental rights without compliance with the provisions of Chapter 39, Florida Statutes. Further, the permanent termination of visitation is appropriate only where other available remedies would be inadequate to protect the welfare of the child. *See* section 61.13(2)(b)1, Florida Statutes, which recognizes "[i]t is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents" after dissolution. *See also Yandell v. Yandell*, 39 So.2d 554 (Fla. 1949). The reason for the sanctions appears to be to punish the mother for her uncooperative and contemptuous conduct. If sanctions are appropriate they should be fashioned other than to be directed against the mother's natural and inherent right to visit her child. The court can also fashion many limitations and restrictions on visitation rather than to deny it entirely, for example, the court can permit visitation only in a secure, supervised environment. *See Vannucci v. Vannucci*, 546 So.2d 800 (Fla. 5th DCA 1989).

The order barring all contact, in any manner or form, and barring visitation should be reversed and the case remanded with directions that some provision for contact and visitation be permitted with only limitations and restrictions necessary to prevent the mother from kidnapping the child or in any manner doing physical harm to the child.

* * *

Criminal law—Capital sexual battery—Reversible error to restrict defense counsel's cross-examination of victim's mother designed to elicit information as to whether child feared mother—Information was relevant to defense that child's fear of mother provided motive for child to falsify or fabricate claim against defendant who was mother's ex-husband

DAVID A. FERGUSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-1237. Opinion filed May 1, 1992. Appeal from the Circuit Court for Orange County, Richard F. Conrad, Judge. Chandler R. Muller and David A. Henson of Muller, Kirkconnell, Lindsey and Snure, P.A., Winter Park, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) We reverse the defendant's convictions and sentences for capital sexual battery and remand for a new trial on the ground that the trial court committed reversible error in restricting defense counsel's cross examination of the child victim's mother which cross examination was designed to elicit information as to whether the child feared its mother. This information was relevant to the defense argument that the child's fear of its mother was the child's reason or motive to falsify or fabricate a claim against the defendant, who was the mother's ex-husband. The defense was entitled to lay a factual basis for this argument to the jury which was directed to the child's credibility as a witness and to the weight the jury might give to the child's testimony. *See generally, Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

REVERSED and REMANDED FOR NEW TRIAL. (GOSHORN, C.J., and COWART, J., concur. SHARP, W., J., dissents without opinion.)

* * *

Criminal law—Sentencing—Guidelines—Departure—Where appellate court reversed downward departure from guidelines for failure to provide written reasons, trial court was required to impose guidelines sentence on remand in compliance with appellate court's mandate

STATE OF FLORIDA, Appellant, v. EUGENE BUCHANAN a/k/a NORMAN BUCHANAN a/k/a DANNY WOODS, Appellee. 5th District. Case No. 91-1799. Opinion filed May 1, 1992. Appeal from the Circuit Court for Orange County, Gary L. Formet, Sr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and James N. Charles, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and Noel A. Pelella, Assistant Public Defender, Daytona Beach, for Appellee.

(COWART, J.) The State appeals a downward departure sentence imposed as a resentencing. The defendant was convicted in each of two cases[1] of dealing in stolen property (§ 812.019, Fla. Stat.); a downward departure sentence was entered, appealed, reversed and remanded for a guidelines sentence. *See State v. Buchanan*, 580 So.2d 201 (Fla. 5th DCA 1991). On motion for rehearing in that case we (1) stated that a downward departure under the sentencing guidelines must be accompanied by written reasons notwithstanding that Florida Rule of Criminal Procedure 3.800(b) permits a downward modification without requiring a written reason, and (2) certified the question, *see* 580 So.2d at 202. The supreme court agreed, *see Buchanan v. State*, 592 So.2d 676 (Fla. 1992).

At resentencing the trial court again entered a downward departure "conditional" "suspended" twelve year[2] sentence. The State again appeals and we again vacate the sentence. Based on *Pope v. State*, 561 So.2d 554 (Fla. 1990), upon reversal of the original downward departure sentences because they were not then supported by written reasons, the trial court was required to impose guidelines sentences in compliance with this court's mandate. Accordingly, the downward departure sentence in the two cases involving dealing in stolen property are vacated and the cause is remanded with directions that the trial court impose a sentence consistent with the sentencing guidelines relating to recommended and permitted sentences.

SENTENCES VACATED; CAUSE REMANDED FOR RESENTENCING. (COBB and SHARP, W., JJ., concur.)

---

[1]The State also appeals a third sentence relating to possession of cocaine (Circuit Court Case Number 91-243) which we affirm.