IN THE SUPREME COURT OF THE STATE OF FLORIDA

ERVIN E. WILLIAMS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 79,976

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ERVIN E. WILLIAMS, Petitioner,	)	
vs.	)	CASE NO. 79,976
STATE OF FLORIDA, Respondent.	)	

STATEMENT OF THE CASE AND FACTS

Petitioner, Ervin Eugene Williams, accepts the Statement of Case and Facts prepared by the Respondent for its brief to the Fifth District Court of Appeal, reprinted here in pertinent part.

Mr. Williams was arrested on March 22, 1991. (R3,57) Williams 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. (R28-30) Williams 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. (R31) Williams pled not guilty and trial was set for August 19, 1991. (R31) A public defender was appointed to represent Williams. (R31) The State Attorney's Office filed a Notice of Intent to Seek Enhanced Punishment on June 5, 1991. (R36)

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. (R6-7) 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 and investigator to the witness' workplace. Judge Sprinkel denied the request. (R6) The State nolle prossed the case, since it could not contact its key witness. (R6) The State went on the record stating it nolle prossed the case and then refiled it because it had no other choice. (R6-7)

The State filed a Nolle Prosequi on September 3, 1991. (R37) On September 12, 1991, Williams' speedy trial period expired. (R3) Williams did not make a demand for speedy trial since the case had been nolle prossed on September 3, 1991. (R3) On September 16, 1991, the State refiled the information charging Williams with Burglary of a Dwelling, Petit Theft, and Dealing In Stolen Property. (R38-40) A capias was issued for Williams on September 16, 1991, (R47-51), and he was again arrested on September 26, 1991. Williams was again arraigned on October 2, 1991, in Case Number CR 91-9863, in front of the Honorable Judge Formet. (R52) Williams pled not guilty and a public defender was appointed. (R52) Williams filed a motion to discharge on October 8, 1991. (R54-55) 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. (R60-61) 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. (R58) An amended order of dismissal was filed on November 7, 1991, by Judge Hauser, nunc pro tunc October 21, 1991. (R60-61) Judge Hauser held that the 15-day window does not apply where the State nolle prossed the case and the refiled it after speedy trial period has run. (R20,60-61)

The State appealed Judge Hauser's order of dismissal and the Fifth District Court of Appeal reversed. State v. Williams, 597 So.2d 960 (Fla. 5th DCA 1992). The court acknowledged the decision relied on by the trial court, quoting from the opinion at length. State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991). However, the court considered Zabrani v. Cowart, 502 So.2d 1257 (Fla. 3rd DCA 1986) to be more persuasive authority in support of the State's position.

On June 1, 1992, Mr. Williams filed a timely Notice to Invoke the Discretionary Jurisdiction of this Court, alleging conflict with State v. Agee. On September 18, 1992, this Court issued an order accepting jurisdiction and dispensing with oral argument. This brief follows.

SUMMARY OF ARGUMENT

Petitioner argues herein that the trial court correctly applied the speedy trial rule in granting his motion for discharge. The rule specifically provides that the intent and effect of the rule may not be avoided by the State by entering a nolle prosequi to a crime then charging a new offense based on the same conduct. To allow the State to use the fifteen day "recapture" provision after a case has been nolle prossed would render the entire speedy trial rule meaningless. The State could delay a case for any reason without permission of the trial court by filing a nolle prosequi and recharging whenever it was ready. As the First District Court of appeal held in Agee, the fifteen day recapture provision was provided for in the rule to insure against discharges due to mere oversight, not to allow intentional circumvention of the rule through entry of a nolle prosequi.

ARGUMENT

THE TRIAL COURT PROPERLY DISCHARGED PETITIONER UNDER THE SPEEDY TRIAL RULE.

In the instant case on the day of trial the State was not prepared to proceed and sought a continuance. The continuance was denied. The State did not seek review of the denial nor was an extension of the speedy trial period sought. Instead the State filed a nolle prosequi and sought to avoid the effect of the adverse ruling on its motion for continuance by refiling the dismissed charge when it was ready to proceed.[1] Rule 3.191(h)(2) clearly does not allow this tactic:

> 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.

Fla.R.Crim.P. 3.191(h)(2).

The State's position is that Rule 3.191(i)(3) should apply in Appellee's situation -- thus even after refiling a dismissed charge the State always has fifteen days to bring a case to trial. This position is unacceptable for several

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[1] It is important to note that without a record of the reasons why the State's request for continuance was denied, and without any appeal from this ruling having been sought, a presumption of correctness must be given to the trial court's ruling. This Court must assume that denial of the requested continuance was a proper ruling and not an abuse of discretion.

reasons.

First, it is inconsistent with Rule 3.191(h)(2), the specific provision of the rule dealing with the effect of a nolle prosequi. The State's position renders 3.191(h)(2) meaningless. Any case could be dismissed on the 174th day for any reason and could be refiled whenever the State is ready for trial at any time within the applicable statute of limitations.

Second, the State's position effectively eliminates judicial control over docketing and speedy trial matters. When the State seeks a continuance or an extension of speedy trial time, Rule 3.191(f) provides that the court may order an extension under exceptional circumstances. The rule specifies that exceptional circumstances "shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or foreseeable delays." (Emphasis supplied) The State's position would render the quoted language meaningless -- avoidable, foreseeable, even negligent delay would be beyond the court's control.

As stated earlier, it should be assumed here that Judge Sprinkel's denial of the State's original motion for continuance was the correct ruling at that time. But if the State believed otherwise it had a remedy -- a petition seeking certiorari review in the District Court of Appeal pursuant to Rule 9.030(b)(2)(A), Florida Rules of Appellate Procedure. Certiorari is the accepted method of review where an allegedly improper ruling of the trial

court would substantially impair the ability of the State to prosecute its case. State v. Mitchell, 445 So.2d 405 (Fla. 5th DCA 1984); State v. Horvatch, 413 So.2d 469 (Fla. 4th DCA 1982); State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982).

Had the State sought review of Judge Sprinkel's decision to deny the continuance then the State would have been permitted to delay presentation of its case if denial of the continuance was error. What the State seeks with the position it takes in this appeal is a way around Judge Sprinkel's denial of their continuance request whether or not the decision was error. Put another way, the State clearly has a remedy when they are right, but seeks a remedy which would apply whether they are right or wrong.

This is not a case of first impression. In discharging Williams the trial court followed the decision of the First District Court of Appeal in State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991). As in the instant case the State in Agee argued the fifteen day recapture provision of the speedy trial rule could be applied following the entry of a nolle prosequi. The First District Court of Appeal rejected this argument and adopted the position argued by Petitioner herein.

> 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.

State v. Agee, 588 So.2d at 603-604.[2]

The State argues that the Agee decision conflicts with Zabrani v. Cowart, 506 So.2d 1035 (Fla. 1987) and State v. Dorian, 16 FLW D2370 (Fla. 3rd DCA September 10, 1991). Those decisions involved the question of whether the old (pre-1985) or the present speedy trial rule (with its fifteen day saving provision) applied. Both decisions hold that the filing of a motion for discharge is the operative event which determines which version of the speedy trial rule applies. However there is no discussion in either case of the effect of the nolle pros by the State. The issue apparently was not raised, or if it was, the court did not consider it necessary to the decision. The only case directly on point is Agee. This Court should adopt the position of the First District Court of Appeal in its well

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[2] The State has sought review of this decision in this Court and the case is now pending. State v. Agee, Supreme Court Case Number 78,950.

reasoned opinion.

In closing, Petitioner would like to repeat his most important point. The position advocated here absolutely will not impair the State's ability to prosecute cases, or delay prosecuting cases, for legitimate reasons. If an extension of the speedy trial period is necessary, the Rule provides a procedure for seeking the extension. The Rule requires that the trial court, not the prosecutor, determine whether the reasons given for extension are acceptable. If a continuance request or a request to extend speedy trial is denied improperly, the State has a remedy in the District Court of Appeal.

The State's position is unacceptable because to allow the use of a nolle pros in the manner used here would allow the State to delay any case beyond the speedy trial deadline for any reason with absolutely no judicial control or review. This position is unreasonable and the decision of the District Court should therefore be reversed.

CONCLUSION

BASED UPON the foregoing arguments and the authorities cited herein, Petitioner respectfully requests that this Court reverse the ruling of the Fifth District Court of Appeal and remand the cause with instructions that Petitioner be discharged.

Respectfully submitted,

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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, #C-071984 (House 2, Quad 4), P.O. Box 628040, Orlando, FL 32862-8040, this 13th day of October, 1992.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER