12-28

IN THE SUPREME COURT OF FLORIDA

ERVIN E. WILLIAMS,

Petitioner,

v. CASE NO. 79,976

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

RESPONDENT'S MERITS BRIEF

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SUMMARY OF ARGUMENT

The trial court in this case, and the First District Court of Appeal in State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991), held that in *any* case in which the state files a nolle prosequi, the "window of recapture" provided for in the speedy trial rule is automatically inapplicable. The state submits that that ruling is inappropriately inflexible. The part of the speedy trial rule that precludes the state from abusing its power to file a nolle prosequi can be enforced without denying the state the remedy of the fifteen-day "window." In cases like this case, where the record does not support the conclusion that the state filed its nolle prosequi in order to circumvent the speedy trial rule, the state should be given the benefit of the "window."

ARGUMENT

THE DISTRICT COURT PROPERLY REVERSED THE ORDER DISCHARGING PETITIONER; THE RECORD DOES NOT SHOW THAT THE STATE FILED A NOLLE PROSEQUI IN THIS CASE TO AVOID THE INTENT AND EFFECT OF THE SPEEDY TRIAL RULE.

The petitioner argues that the trial judge in this case, the Honorable James A. Hauser, correctly interpreted Rules 3.191(h)(2) and 3.191(i), Florida Rules of Criminal Procedure. Judge Hauser's ruling was that in *any* case in which the state files a nolle prosequi, the "window of recapture" provided for in Rule 3.191(i) is automatically inapplicable. The First District Court of Appeal, in State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991)[1], agrees with Judge Hauser. The Second, Third and Fifth District Courts of Appeal disagree. See State v. Williams, 597 So.2d 960 (Fla. 5th DCA 1992) (this case); State v. Dorian, 16 FLW 2370 (Fla. 3rd DCA September 10, 1991); Cook v. Snyder, 582 So.2d 1239 (Fla. 3rd DCA 1991); Upshaw v. State, 505 So.2d 455 (Fla. 2d DCA 1987). The state submits that the Second, Third and Fifth District Courts are correct, and that the district court's decision and opinion in this case should be approved.

Rule 3.191(h)(2) provides that

> 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 prosecutig new and different charges based on the same conduct or criminal episode whether or not the

[1] Pending review in this court, in case no. 78,950.

> pending charge is suspended, continued, or is the subject of entry of a *nolle prosequi.*

That subsection has appeared in Florida's speedy trial rule since it was first adopted by this court in 1971. In re Florida Rules of Criminal Procedure, 245 So.2d 33, 37 (Fla. 1971) (adopting interim Rule 1.191). It appears to have been based on the decision in State ex rel. Bird v. Stedman, 223 So.2d 85 (Fla. 3rd DCA 1969). See generally T. Wills and A. Caruana, Criminal Law and Procedure, 26 U. Miami L. Rev. 289, 360 n. 561 and accompanying text (1972). In Stedman, the state filed a nolle prosequi near the end of the speedy trial period established at that time by statute. Defendant Bird, who had demanded a speedy trial before the nolle prosequi was entered, filed a suggestion for a writ of prohibition at the end of the statutory period. The state took the position that the defendant's demand for discovery referred to a prosecution that was no longer in existence. The district court held that Bird was entitled to discharge since

> [t]he suggestion, the reply of the respondent, and the briefs make clear that the sole question presented is whether the state may avoid the effect of [the speedy trial statute] by dismissing the prosecution of respondent and then subsequently refiling the same charge under a new information....It is clear in the instant case that the nolle peosequi was entered by the prosecution solely for the purpose of avoiding the effect of the statute. The reply to the suggestion contains the statement: "The respondent admits the accuracy of all factual allegations contained

> in the suggestion for the writ of prohibition and the exhibits thereto." No other reason for the discontinuance of the first prosecution is given.

223 So.2d at 85-6. The Third District Court went on to note that failure to order discharge in those circumstances

> would make possible the indefinite postponement of prosecution for a crime by the simple expedient of a continuous entry of nolle prosequis and a continuous refiling of informations charging the same crime. This would violate the right of one accused of a crime to a speedy trial, which right is guaranteed by the Declaration of Rights, §16, Florida Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution.

Id. at 86. Cf. State v. Sokol, 208 So.2d 156 (Fla. 3rd DCA 1968) (defendant charged September 27, 1966; state filed nolle prosequi before jury sworn January 23, 1967; state refiled charges February 1, 1967; appellant's motion to quash on speedy trial grounds denied).

Effective January 1, 1985, this court amended Rule 3.191 to add subsection (i), which contains the fifteen-day "window of recapture" permitting the state to bring defendants to trial in felony cases although the relevant speedy trial period has run. Florida Bar Re: Amendment to Rules--Criminal Procedure, 462 So.2d 386 (Fla. 1984). The purpose of the amendment was to "giv[e] the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints." Committee Note, 1984 Amendment to Rule 3.191, 33 F.S.A. 322 (1989).

Judge Hauser in this case, and the First District Court in Agee, supra, read subsection (h)(2) to be at complete odds with subsection (i). The state submits that the two rules may both be applied in the same case without doing violence to the language or meaning of either provision. The intent of Rule 3.191(h)(2) is to prevent the state from deliberately circumventing the speedy trial rule. Stewart v. State, 491 So.2d 271, 272 (Fla. 1986); accord Fyman v. State, 450 So.2d 1250 (Fla. 2d DCA 1984) and State v. Rheinsmith, 362 So.2d 698 (Fla. 2d DCA 1978). In this case the state's representative, without contradiction, represented to the trial court that the state filed a nolle prosequi because the previously-assigned trial judge denied a one-day request for a continuance to locate a witness who was subpoenaed but did not appear, and whose whereabouts were known. (R 6-7) Mr. Williams was first charged on April 11, 1991; the state's nolle prosequi was filed September 3, 1991. (R 23-30, 37)[2] The same charges were refiled within two weeks, on September 16. (R 3, 38-46) The record in this case does not support a conclusion that the state intended, by filing its nolle prosequi, to try to circumvent the speedy trial rule. Cf. Stedman, supra; see Stewart, supra.

The petitioner now argues that the trial courts will lose all control of their dockets if this court does not hold that filing a nolle prosequi absolutely precludes application of the "window of recapture." The state suggests that this is simply not

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[2] The parties stipulated that the 175-day period provided in Rule 3.191(a)(1) would have expired September 12. (R 3)

true, since the trial court can determine, after hearing the state's explanation for its actions, whether a nolle prosequi in a given case was filed to "avoi[d] ...[t]he intent and effect" of the speedy trial rule. Rule 3.191(h)(2), Fla.R.Crim.P. See generally Thomas v. State, 374 So.2d 508, 513 (Fla. 1979) (spirit of rule violated when state deliberately files charges piecemeal to avoid effect of speedy trial rule; no showing of abuse in that case).

The petitioner also argues that the state in this case should have sought an extension of time pursuant to Rule 3.191(f) when the trial judge denied its request for a one-day continuance. The same judge who finds a one-day continuance unacceptable is less than likely to rule that the reason for the one-day delay is an "exceptional circumstance" justifying a related extension of time. The motion would have been a futile gesture. Petitioner argues, as an alternative, that the state in this case could and should have sought certiorari review of the order denying its one-day continuance in the Fifth District Court of Appeal. The writ of "common-law" certiorari, like other extraordinary remedies, is not available to parties who have an ordinary remedy available to them. Shevin ex rel. State v. Public Service Commission, 333 So.2d 9 (Fla. 1976); State ex rel. Department of General Services v. Willis, 344 So.2d 580, 592-3 (Fla. 1st DCA 1977). The state in this case reasonably relied on Upshaw v. State, 505 So.2d 455 (Fla. 2d DCA 1987), supra, and on Cook v. Snyder, 582 So.2d 1239 (Fla. 3rd DCA 1991), supra, as establishing that it had an ordinary remedy--that of filing a

nolle prosequi, refiling charges without delay, and, on the defendant's filing a motion for discharge, bringing him to trial within the fifteen-day window.

Defendants will not be deprived of an important right by a decision approving the result reached by the Second, Third and Fifth Districts on this point. The courts can enforce subsection (h)(2)'s prohibition of abuse without denying the "window" remedy in cases like this one, where the state's plans go slightly awry. Rule 3.191 entitles defendants to speedy *trial*, not to automatic discharge when an an otherwise expeditiously-handled prosecution suffers an unexpected delay which amounts to a few days. See generally Tucker v. State, 559 So.2d 218, 220 (Fla. 1990) (technical noncompliance with rules permissible where no harm to defendant); Hoffman v. State, 397 So.2d 288, 290 (Fla. 1981) (rules not intended to furnish procedural device to escape justice). Excessive preindictment delay in any case will, of course, entitle the defendant to relief pursuant to the Florida and federal constitutional speedy trial provisions. E.g., Doggett v. United States, ___ U.S. ___, 112 S.Ct. 2686, ___ L.Ed.2d ___ (1992).

The decision of the District Court of Appeal should be affirmed.

CONCLUSION

The Respondent requests this court to approve the decision and opinion of the district court in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Merits Brief has been delivered by hand to Daniel J. Schafer, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, 32114, this 30th day of November, 1992.

NANCY RYAN
Assistant Attorney General