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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

CASE NO. *82217*

DCA CASE NO. 92-1972

MARVIN REED,

Defendant/Petitioner,

-vs-

STATE OF FLORIDA,

Plaintiff/Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER MARVIN REED ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The petitioner, MARVIN REED, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The respondent, State of Florida, was the prosecution in the trial court and the appellee on direct appeal. The parties will be referred to as they appeared below. The symbol "R" will be used to designate documentary evidence and pleadings contained within the record on appeal. "TR" will represent the transcripts of pre-trial proceedings including the defendant's motion for discharge. An appendix is attached hereto containing a conformed copy of the decision of the District Court of Appeal.

Reed was arrested and taken into custody on January 4, 1991. An information was filed charging him only with two counts of leaving the scene of an accident. [R1-2] Exactly 174 days later the State filed a nol pros. On July 15, 1992, 192 days after Reed's arrest, he filed a motion for discharge pursuant to Fla.R.Crim.P. 3.191. [R 59] On September 6, 1991, 245 days after Reed's arrest, the State refiled charges against Reed resurrecting its abandoned prosecution and adding four additional life felony counts. [R 3-9] A hearing was held on December 13, 1991, whereafter the trial court ruled that Reed's motion for discharge was a nullity and ordered the motion stricken. [TR 17-29]

Reed filed a suggestion for writ of prohibition generating case number 92-201 in the District Court of Appeal. The District Court entered an order of denial on March 19, 1992.

On May 6, 1992, Reed was charged in the last of a series of

informations with two counts of aggravated battery [Counts I and II], two counts of armed robbery [Counts IV-VII], three counts of kidnapping [Counts XI-XI], and two counts of leaving the scene of an accident involving personal injury [Counts XII-XIII]. [R 18-30] A trial by jury commenced on May 11, 1992. The State ultimately nol prossed Counts I and VII. The jury found the defendant guilty of Counts IV, V, X, XI, XII, and XIII and not guilty of Counts II, III, VI, VIII, and IX. [R 94-104]

The trial court sentenced the defendant as an habitual violent felony offender to concurrent terms of life imprisonment on Counts IV, V, X, and XI and to concurrent five year terms of imprisonment on Counts XII and XIII. [R 106-109] In addition, the Court ordered a 15 year minimum mandatory term of imprisonment and restitution in the total amount of \$296,000.00. [R 109-110]

The defendant prosecuted a timely appeal to the Third District Court of Appeal. He presented three issues including the denial of his right to a speedy trial:

III - The trial court erred in failing to grant the defendant's motion for discharge and thereby violated his rights under the speedy trial rule as well as his constitutional right to a speedy trial and his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as Article I Section 16 of the Florida Constitution.

On June 15, 1993, the Third District issued a per curiam affirmance relying on State v. Dorian, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993) (en banc) and two other cases not germane to Reed's speedy trial claim. [Appendix A] Reed filed a timely

motion for rehearing challenging the Court's reliance on Dorian. During the pendency of Reed's motion for rehearing, this Court promulgated State v. Agee, 18 Fla. L. Weekly S391 (Fla. July 1, 1993). Reed filed a notice of intent to rely on additional authority which crossed in the mail with the District Court's order denying rehearing on July 13, 1993. In light of Agee, Reed filed a motion for reconsideration of order denying rehearing which the District Court of Appeal denied on August 10, 1993.

Reed timely filed a notice to invoke discretionary jurisdiction on August 12, 1993. This brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

The State initially charged Reed with relatively minor offenses. One hundred seventy-four (174) days after Reed's arrest, one day prior to the expiration of the speedy trial period of Rule 3.191, the State announced a nol pros. Approximately three months later, the State resurrected its prosecution of Reed, adding a number of much more serious life felonies. Even though the conduct of the State was clearly designed to gain a tactical advantage, Reed's motion for discharge was denied. That was error. The District Court of Appeal of Florida, Third District, compounded the error by rejecting Reed's speedy trial claim on the basis of its decision in State v. Dorian, 18 Fla. L. Weekly D857 (Fla. 3d DCA March 30, 1993) (en banc). This Court, in State v. Agee, 18 Fla. L. Weekly S391 (Fla. July 1, 1993) resolved the conflict between Dorian and State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991), upon which Reed had consistently relied. This Court approved Agee and disapproved Dorian (Overton, J., dissented). The District Court of Appeal of Florida should have followed Agee and granted Reed relief. Its erroneous reliance on Dorian creates direct and irreconcilable conflict with Agee. Certiorari should be granted.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, REJECTING THE PETITIONER'S SPEEDY TRIAL CLAIM AND AFFIRMING HIS CONVICTION AND SENTENCE ON THE BASIS OF STATE V. DORIAN, 18 FLA. L. WEEKLY D856 (FLA. 3D DCA MARCH 30, 1993) (EN BANC) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN STATE V. AGEE, 18 FLA. L. WEEKLY S391 (FLA. JULY 1, 1993).

The reliance by the District Court of Appeal of Florida, Third District, upon State v. Dorian, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993) (en banc) to resolve Reed's speedy trial claim, in light of this Court's disapproval of Dorian in State v. Agee, 18 Fla. L. Weekly S391 (Fla. July 1, 1993), creates direct, express, and irreconcilable conflict. The State resurrected its prosecution of Reed after having initially announced a nol pros on day 174 of the speedy trial period. By its nol pros, the State sought to unilaterally toll the running of the speedy trial period for a period of time during which it was able to conduct further investigation and ultimately add additional, more serious, charges against Reed. Because Agee controls here, the District Court's stubborn adherence to Dorian, like the trial court's denial of Reed's motion for discharge, was error. This Court should exercise its discretionary jurisdiction to correct that error.

The defendant was arrested and taken into custody on January 4, 1991. An information was filed charging him only with two counts of leaving the scene of an accident even though, at the time

of his arrest, he had been positively identified as the perpetrator of all the other offenses with which he was ultimately charged. (And from which he was fleeing when he committed the leaving the scene offenses). [R 1-2] Remarkably, exactly 174 days later [one day short of the 175 days giving effect to Rule 3.191(a)], when the case was called for trial, the State filed a nol pros. Only later, having enjoyed an additional two and a half months to investigate and prepare, did the State on September 6, 1991, file an information like the one upon which the defendant was ultimately convicted (charging not only the original leaving the scene counts but an additional number of life felonies). [R 3-9] There can be no legitimate question that the State's nol pros was a tactical maneuver which accrued to the unfair benefit of the prosecution and the undeniable prejudice to Reed.

Dorian, upon which the District Court relied, involved the good faith exception to the speedy trial rule under circumstances where the State, unable to locate its witnesses, nol prossed a first degree murder indictment in good faith. No contrary claim was made by the defendant in Dorian. Here, to the contrary, the State had no intent to "drop the charges" as it did in Dorian. It never complained, for any reason, that it was unable to proceed at the initial trial setting on June 27, 1991. What it clearly did do, however, was fail to file an information containing all the offenses it wanted to prosecute against the defendant. Thus far, through the appellate process, it has successfully visited the consequences of that oversight upon Reed.

This Court in Agee, having granted conflict jurisdiction, resolved the conflict which had existed between State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991), which Reed consistently argued in support of his prayers for relief, and State v. Dorian, supra, upon which the Third District predicated its decision. This Court approved Agee and disapproved Dorian. (Overton, J., dissented)

The circumstances of Agee are materially indistinguishable from those in the case at bar. There, the State argued that the speedy trial rule was inapplicable during the period after entry of a nol pros and before charges are refiled and that a nol pros removed a defendant from the "accused" category and placed him or her in the same position as any other suspect in a criminal investigation. It should be noted, that in Agee, unlike the case at bar, the State had a legitimate reason to nol pros in light of the fact that its attempted murder victim was comatose and there were no known eye witnesses.

This Court rejected the State's argument and held:

To allow the State to unilaterally toll the running of the speedy trial period by entering a nol pros would eviscerate the rule - a prosecutor with a weak case could simply enter a nol pros while continuing to develop the case and then refile charges based on the same criminal episode months or even years later, thus effectively denying an accused the right to a speedy trial while the State strengthens its case. [Id. at S392]

This Court discussed both the purpose of the rule ("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") and the legitimate options available to the State (postponing arrest or seeking a speedy trial extension for good cause).

This Court's decision is entirely consistent with the intent of Fla.R.Crim.P. 3.191(o), which 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 rounded 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.

Here, there is no question that the subsequent robbery, aggravated battery, and kidnapping charges filed against Reed after the State's nol pros were based on the same occurrence as the original charge of leaving the scene of an accident, just as the new and old charges, although different, were related in Agee. In short, Dorian which has been disapproved, should not have controlled the resolution of Reed's claim. The District Court's express reliance on Dorian has created and reflects, a direct conflict between the law of this Court and the decisions of the Third District Court of Appeal. Discretionary review should be granted to resolve that conflict.

CONCLUSION

WHEREFORE, MARVIN REED, through counsel, respectfully invokes this Court's discretionary jurisdiction.

Respectfully submitted,

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BY:



GEOFFREY C. FLECK, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Charles M. Fahlbusch, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128, this 16th day of August, 1993.

BY:



GEOFFREY C. FLECK, ESQUIRE

IN THE SUPREME COURT OF FLORIDA

CASE NO.

DCA CASE NO. 92-1972

MARVIN REED,

Defendant/Petitioner,

-vs-

STATE OF FLORIDA,

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ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT
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APPENDIX

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- A. Decision of the District Court of Appeal of
Florida, Third District, below

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1993

MARVIN REED,	**	
Appellant,	**	
vs.	**	CASE NO. 92-1972
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed June 15, 1993.

An Appeal from the Circuit Court for Dade County,
Fredricka G. Smith, Judge.

Friend & Fleck and Geoffrey C. Fleck, for Appellant.

Robert A. Butterworth, Attorney General, and Charles M.
Fahlbusch, for Appellee.

Before NESBITT, FERGUSON and GODERICH, JJ.

PER CURIAM.

Affirmed. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986);
State v. Dorian, 18 Fla. L. Weekly D856 (Fla. 3d DCA Mar. 30,
1993)(en banc); United States v. Brooklier, 685 F.2d 1208 (9th
Cir. 1982), cert. denied, 459 U.S. 1206 (1983).