IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,217

DCA CASE NO. 92-1972

MARVIN REED,

Defendant/Petitioner,

vs.

THE STATE OF FLORIDA,

Plaintiff/Respondent.

FILED
SID J. WHITE
JAN 28 1994
CLERK, SUPREME COURT
By Chief Deputy Clerk

* *

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

* *

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Florida Bar No. 0191948
Assistant Attorney General
Department of Legal Affairs
Suite 505-South
4000 Hollywood Boulevard
Hollywood, Florida 33021
(305) 985-4795

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

POINT ON APPEAL 10

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

THE DEFENDANT WAS NOT IMPROPERLY DENIED A SPEEDY TRIAL AS TO CHARGES INITIATED SUBSEQUENT TO A NOLLE PROSEQUI OF OTHER CHARGES. (Restated).

CONCLUSION 20

CERTIFICATE OF SERVICE 20

TABLE OF CITATIONS

CASE	PAGE
Carter v. State, 432 So. 2d 797 (Fla. 2d DCA 1983); rev. denied, 440 So. 2d 353 (Fla. 1983)	16
Gallego v. Purdy, 415 So. 2d 166 (Fla. 4th DCA 1982)	19
Giglio v. Kaplan, 392 So. 2d 1004 (4th DCA 1981)	15
Rivers v. State, 425 So. 2d 101, 106 (Fla. 1st DCA 1983); rev. denied, 436 So. 2d 100 (Fla. 1983)	17
Snead v. State, 346 So. 2d 546, 547 (Fla. 1st DCA 1976); cert. denied, 348 So. 2d 953 (Fla. 1976)	14, 18
State v. Agee, 622 So. 2d 473 (Fla. 1993)	11, 13, 17, 18
State v. Condon, 444 So. 2d 73 (Fla. 4th DCA 1984)	19
State v. Deratany, 410 So. 2d 977 (Fla. 5th DCA 1982)	14
State v. De Santos, 251 So. 2d 289 (Fla. 3d DCA 1971)	14
State v. Lynch, 445 So. 2d 687 (Fla. 2d DCA 1984)	16
State v. Stanley, 399 So. 2d 371 (Fla. 3d DCA 1981); rev. denied, 408 So. 2d 1095 (Fla. 1981)	16
State v. Van Winkle, 407 So. 2d 1059 (Fla. 5th DCA 1981)	17
United States v. Gonzalez, 671 F.2d 441 (11th Cir. 1982); cert. denied, 456 U.S. 994 (1982)	19
United States v. Sanchez, 722 F.2d 1501 (11th Cir. 1984); cert. denied, 467 U.S. 1208 (1984)	15

Walker v. State,
390 So. 2d 411 (Fla. 4th DCA 1980) 15, 16

OTHER AUTHORITIES

Florida Rule of Criminal Procedure
3.191(h)(2)(1992) 13

INTRODUCTION

The Petitioner, **MARVIN REED,** was the defendant in the trial court and the Appellant in the court below. Respondent, **THE STATE OF FLORIDA,** was the prosecution in the trial court and the Appellee in the Third District. The Petitioner, in this brief, will be referred to as he stood in the trial court and the Respondent will be identified as the State. The symbol "R" will be used, in this brief, to refer to the Record on Appeal before the Third District, the symbol "App." will refer to the Appendix to the Petitioner's Brief on the Merits and the symbol "T" will designate the transcript of trial court proceedings. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Statement of the Facts are generally correct accounts of the proceedings below, insofar as they are relevant to the issues in this appeal. However, they do contain many material omissions and a number of argumentative statements which are corrected below as a condition of the Respondent's acceptance thereof (which acceptance is limited to the issues concerned in this appeal, at any rate):

The defendant was charged by Information, on January 24, 1991, with 2 Counts of Leaving the Scene of an Accident Involving Personal Injury. (R. 1-2). He had been arrested on January 4, 1991 following a high speed chase after a robbery of a Circle K store. (R. 59). The State, on June 27, 1991, nolle prossed the leaving the scene charges against Mr. Reed. (App. 19). Subsequently, on July 15, 1991, the defense filed a motion for discharge on speedy trial rule grounds. (R. 59, App. 19).

The State, on September 6, 1991, refiled the case against the defendant in an Information which alleged two (2) counts of Aggravated Battery, Armed Robbery, Robbery and two (2) counts of Kidnapping (R. 3-9). Eventually, the Information concerned was amended to charge two (2) counts of Aggravated Battery, four (4) counts of Armed Robbery, three (3) counts of Kidnapping and two (2) counts of Leaving the Scene of an Accident Involving Personal Injury. (R. 18-30).

A hearing was held on the Defendant's Motion for Discharge on December 13, 1991. (App. 17). The State argued that, where the defense had filed its Motion for Discharge at a time when there was no case pending before the trial court, the Motion for Discharge, itself, was a nullity and had no legal effect. (App. 19-22). The Defense argued that such reasoning would permit the State to avoid the speedy trial rule by simply filing a nolle pros. (App. 20-23). The Court denied and struck the Motion for Discharge and set the matter for trial. (App. 23-28). The Defendant filed a Petition for Prohibition and the district court, after requiring a Response by the trial court judge, on March 19, 1992, denied the Petition in Third District Case No. 92-201.

Mr. Menendez was working in the office next to the counter in the store on the morning of January 4, 1991. (T. 387). He saw a man with a gun push Mr. Perez, who was working the counter and Perez fell down and hit his head on a table. (T. 389). The gunman told Menendez to open the safe, hit him on the back of the head with the gun and he lost consciousness. (T. 391). When he woke up, another person, not the gunman, took him into the back room. (T. 393).

Mr. Menendez got a good enough look at the robbers so that he could recognize them if he saw them again. (T. 438). The

defendant is that person, the one who hit him over the head during the robbery. (T. 455).

Michael Ahrenn, who worked near the Circle K at the time of the crime saw a tan car with a black top pull up. (T. 517). It had two black males in it and they had been there the day before. (T. 517). The witness got into his truck and went around the block. As he returned, he saw the two guys run out of the Circle K with the one in the orange shirt in front and get into the car. (T. 524). Subsequently, the police asked him to come to the scene of an accident to see if he could identify the car he had seen. (T. 526). He did identify the car that he had seen pull out of the Circle K and was also able to identify both the person in the black shirt and tan shorts and the man in the orange shirt that he had seen running from the store. (T. 528-530). There is no doubt in his mind that the people he saw at the accident scene were the ones he saw running from the Circle K and no doubt that the car he saw was also the one at the store. (T. 567).

Mr. Thomas Holcomb went into the Circle K that morning to pay for gas. (T. 568-569). The person behind the counter told him to go in the back room, twice. He did. (T. 569). He went into the back room and, a few minutes later a man with a gun who had an orange-red shirt up to his nose came in, pointed the gun at the people who were in the room and asked for their rings and watches. (T. 570). The gun looked like the one recovered from

the accident scene. (T. 571, 685-692). The witness gave the man his watch and ring because he didn't want to get shot. (T. 571). The watch and ring were recovered from the defendant. (T. 572, 870-871). After that, the police asked if he was up to identifying anybody at an accident scene and he went to the scene in a police cruiser. (T. 574). He recognized the person who had been behind the counter when he walked in and also the one that had held him up with the gun. (T. 575). The defendant is the one who robbed them with a gun. (T. 575-576).

Mr. Gary Ellenburg was another customer of the Circle K that morning. (T. 585). When he walked in, the black gentleman behind the counter told him to get in the back room. (T. 585-586). When he got close to the counter he saw a man lying behind the counter in a puddle of blood and decided that he ought to do as the man asked. (T. 586). Subsequently, a man with a gun came in the room. The gun was a black, fully loaded revolver with a red night sight on the end. (T. 587). The man had a medium build and wore a red shirt with a football logo on it pulled up to his nose. (T. 587). The man pushed the gun in his face and asked for his wedding ring, which he gave to him. (T. 587-588). The gun found at the accident scene is definitely the gun that he saw. (T. 588, 685-692). The wedding ring was one of the rings found in the defendant's pockets. (T. 588, 870-871). After the robbery, he was taken to the accident scene where he saw the gun that the gunman had laying there and saw the two subjects in the

back of a patrol car. (T. 590). The car that was parked outside the Circle K before the robbery was there (T. 591) and the witness was also able to identify the man with the gun. (T. 591). He was also able to identify the man who had been behind the counter, who he had gotten a better look at because he didn't have a shirt over his face or a weapon. (T. 592).

Lieutenant Milton Brelsford (a Sergeant, at the time) saw the black and vanilla Lincoln Town car that had been described by the dispatcher pass him going north on the turnpike. (T. 634-636). There were two men in the car and the driver was a black male with a thin mustache wearing an orange T-shirt. (T. 636-637). (T. 637). The defendant was the driver. (T. 637). He spotted them about 10:18 a.m. (T. 638). The driver was holding currency in his left hand. (T. 638). The witness attempted to stop the car at the toll plaza by turning on his vehicle's emergency equipment, opening his door, pointing his revolver at the occupants and ordering them to stop. (T. 639-640). They both ducked down in the car and left the toll plaza going northbound on the turnpike. (T. 640-641). The witness pursued with lights and sirens. (T. 641). As they passed over a bridge, the passenger threw a bag out the window which was later determined to be a bag from the Circle K that contained toothbrushes and deodorant. (T. 641, 676-678). They continued north at an extremely high rate of speed until they got to the exit at 216 street, which they took. (T. 642). The car slowed

down a bit as it took the exit, but about halfway down it began to accelerate again and the whole intersection blew up. (T. 642). The defendant's car was disabled, but he dove out the window and started running north. (T. 643). The officer followed him. (T. 644). The defendant tried to climb the fence by the turnpike, but the officer was able to grab him by the neck of his shirt as he was on the fence. (T. 644). As the officer pulled him off the fence, he passed out. (T. 644). There was still another suspect in the car, during this time. (T. 643-644).

Detective Aaron Fletcher described the scene of the accident. (T. 682-712). This included the .357 Magnum Revolver that was found in the roadway by the driver's door (T. 685-692), live rounds of ammunition found on the roadway nearby (T. 686) and a book of lottery tickets hanging out of the driver's side of the vehicle. (T. 693). An application for employment with Circle K was found in the road at the scene (T. 693-694). A packet of Circle K money orders were found on the floorboard of the driver's side of the car (T. 694) and a plastic bag of currency was found at the scene. (T. 695-696).

Marie Beers, one of the accident victims, spent thirty-three days in the hospital, having lost a kidney and her spleen due to the accident, among other things. (T. 748-755). Fannie Hunter, another accident victim, woke up in the hospital with a

broken pelvis, a broken leg, five broken ribs and other injuries. (T. 756-758).

Kevin McMillian's right thumbprint was found on one of the lottery tickets that was in the book hanging out of the door of the car. (T. 846-849). A print of McMillian's left index finger was found on the cylinder of the revolver found at the scene. (T. 850-853).

Detective John Deegan arrived on the accident scene within five minutes of the accident. (T. 856-864). Witnesses Holcomb, Ellenberg and Aarons were transported to the scene to view the subjects. (T. 685). Each of the witnesses was kept separated from the other two during the showup procedure. (T. 866). Mr. Ellenberg identified both subjects and was positive that the defendant was the one who robbed him. (T. 868). Mr. Holcomb did not make any identification of Mr. McMillian but did identify the defendant as the person who robbed him. (T. 869). Mr. Aarons identified both subjects as the persons he had seen at the Circle K. (T. 870). After the identifications procedures were completed, both subjects were searched and two wedding rings and a watch were removed from the defendant's pockets. (T. 870-871). The amount of currency found at the scene, which was in plastic safe drop containers, was $1,177.70. (T. 873-875). After the defendant was brought to the office and informed of his rights, he said, "You've got us cold. We did it and you know it, and I'm not going to say anything more." (T. 906).

The defendant testified, in the defense case, essentially as set forth on pages six and seven of the defendant's brief. (T. 968-1002). He has been convicted of crimes five times. (T. 1003).

Kevin McMillian testified, in essence, that he did the robbery alone. (T. 1079-1107).

POINT ON APPEAL

WHETHER THE DEFENDANT WAS NOT IMPROPERLY DENIED A SPEEDY TRIAL AS TO CHARGES INITIATED SUBSEQUENT TO A NOLLE PROSEQUI OF OTHER CHARGES. (Restated).

SUMMARY OF THE ARGUMENT

The charges of which the defendant was convicted in this case, with two minor exceptions, did not arise from the same conduct or criminal episode as the crimes which were nolle prossed by the state. Therefore, this case is clearly distinguishable from State v. Agee, 622 So. 2d 473 (Fla. 1993) and the Rules of Criminal Procedure did not, and do not require that the defendant be discharged.

The law of Florida is clear that flight from a crime is not, for speedy trial purposes, part of the same criminal episode as the substantive crime, itself. Thus, where the crimes which were nolle prossed were solely those which took place during the flight (even viewing the evidence in light most favorable to the defense), it can not reasonably be held to have violated the defendant's speedy trial rule rights with regard to substantive crimes with which he had never been charged.

The district court, with the exception of the two leaving the scene charges, was correct.

ARGUMENT

THE DEFENDANT WAS NOT IMPROPERLY DENIED A SPEEDY TRIAL AS TO CHARGES INITIATED SUBSEQUENT TO A NOLLE PROSEQUI OF OTHER CHARGES. (Restated).

The defendant was arrested on January 4, 1991 (R. 59)[1] and, shortly thereafter, was charged with 2 Counts of Leaving the Scene of an Accident Involving Personal Injury. (R. 1-2). These were the only charges pending against the defendant at the time of the nolle prosequi. (R. 1-9, App. 19). Nevertheless, the essence of the defense position is that, when the State nolle prossed the leaving the scene charges (and speedy trial time ran as to them and a motion for discharge was filed), they lost their ability to prosecute not only the leaving the scene charges, but all of the robbery-related charges. (Petitioner's Brief, 9-15). That is despite the fact that the robberies involved a situation that had taken place at a different location from the accident, had different victims than the accident and involved different witnesses than the accident. (T.). It is respectfully submitted that the defense is incorrect.

---

[1] It appears that the defense neither alleged nor proved what charges the defendant was arrested on. (R. 59, App.). However, the undersigned believes that it was for armed robbery.

It is certainly true that Florida Rule of Criminal Procedure 3.191(h)(2)(1992) 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. (emphasis added).

Thus, when the language of this rule is combined with the recent reasoning of State v. Agee, 622 So. 2d 473 (Fla. 1993)(which didn't, of course, exist at the time that the district court rendered its opinion), it is clear that the 2 counts of Leaving the Scene of an Accident with Injury were dischargeable. However, the entire defense analysis as to the other charges is based on a fallacious statement of law, given without reference to any legal authority, that, "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 charges of leaving the scene of an accident. . . ." (Petitioner's Brief, 14-15). Based upon this "leap of faith," the Petitioner finds this situation indistinguishable from Agee. (Petitioner's Brief, 14)).

The starting point for the correct analysis of the speedy trial situation regarding this case is the holding that, "an arrest in which no charge is made does not commence the period in which a speedy trial is required . . ." Snead v. State, 346 So. 2d 546, 547 (Fla. 1st DCA 1976); cert. denied, 348 So. 2d 953 (Fla. 1976). Thus, the fact that a defendant was picked up, taken to jail and questioned about a robbery and assault in which one of the victims died did not begin the running of the speedy trial period on the murder, which was held to begin to run some 18 months later, when the defendant was indicted for the murder. Id. Thus, even prior to the adoption of the speedy trial rule, it is understandable why the court would hold that the fact that the State was cognizant of the instant charge at the time that the defendant was arrested did not begin the running of the time for the constitutional right to speedy trial. State v. De Santos, 251 So. 2d 289 (Fla. 3d DCA 1971). Similarly, where a defendant was charged with two separate and distinct crimes which were committed at different times (albeit they both concerned false statements regarding the same allegedly stolen jewelry; one a false police report and the other a false insurance claim presented four days later), his being held to answer charges on the first crime had no impact, for speedy trial purposes, on his arrest for the second crime. State v. Deratany, 410 So. 2d 977 (Fla. 5th DCA 1982). Also enlightening is the fact that, when an accused who was in custody on another offense confessed to a burglary, speedy trial

time did not begin to run until some two months later, when he was formally charged with the burglary. Giglio v. Kaplan, 392 So. 2d 1004 (4th DCA 1981); See also, United States v. Sanchez, 722 F.2d 1501 (11th Cir. 1984); cert. denied, 467 U.S. 1208 (1984).

The fact that the defendant was in flight from the robbery, at least arguably, at the time of the accident does not make the defense claim valid. The court, in a case involving charges of vehicular homicide, leaving the scene of an accident and driving while license suspended (all involving the same accident and flight from it) stated the issue as follows:

> The issue on appeal is whether the crimes of vehicular homicide and leaving the scene of an accident arose from the same criminal episode. If they did then reversal is required because the time periods under the speedy trial rule begin to run when the accused "is taken into custody as a result of the conduct or criminal episode giving rise to the crime charged." Fla.R.Crim.P.3.191(a)(1).
>
> Walker v. State, 390 So. 2d 411 (Fla. 4th DCA 1980).

The court answered that question as follows:

> The accident itself was one criminal episode. From it the manslaughter charge arose. Nothing that happened subsequently had any effect on that conduct or that criminal charge. When appellant fled the scene he committed an entirely separate, unrelated crime. This was new and different conduct. It was an independent criminal episode. (emphasis added).

Id.

This distinction, between the crime and flight from the crime, was clarified and used to the disadvantage of the State in Carter v. State, 432 So. 2d 797 (Fla. 2d DCA 1983); rev. denied, 440 So. 2d 353 (Fla. 1983), in which the court said:

> The state's reliance on *Walker v. State,* 390 So.2d 411 (Fla. 4th DCA 1980), is misplaced. In the *Walker* case, the defendant was involved in a vehicular accident and as a result was charged with vehicular homicide, leaving the scene of an accident, and driving while his license was revoked. In that case, the accident, as in the case sub judice, was one criminal episode. When the defendant left the scene of the accident, it was an independent episode that had no effect on the conduct or criminal charge of vehicular homicide or driving while license was suspended or revoked. In the case sub judice, both offenses arose from the same conduct and the same criminal episode.

Id. at 798.

Additionally, the fact that the police originally approached a defendant to investigate suspected cocaine possession and, in fact, discovered cocaine on him did not require that the speedy trial period begin to run on the cocaine charge where the defendant was arrested and initially charged only with battery of a police officer. State v. Lynch, 445 So. 2d 687 (Fla. 2d DCA 1984). It is settled that the State need not charge a defendant with all crimes of which it has probable cause or risk dismissal under the speedy trial rule. State v. Stanley, 399 So. 2d 371 (Fla. 3d DCA 1981); rev. denied, 408 So. 2d 1095

(Fla. 1981). Further, it has been held that, where the crimes concerned involved different times, locations and victims (as they do in this case), they did not involve the, "same conduct or criminal episode" for purposes of the speedy trial rule. State v. Van Winkle, 407 So. 2d 1059 (Fla. 5th DCA 1981); See also, Rivers v. State, 425 So. 2d 101, 106 (Fla. 1st DCA 1983); rev. denied, 436 So. 2d 100 (Fla. 1983).

The Petitioner in this case cannot rely on alleging that the defendant was arrested for robbery so that speedy trial time began to run on the robbery related charges for three reasons. First, that was not a fact ever alleged or presented to the trial court. (R. 59, App.). Second, rule 3.191(h)(2)(1992), the rule on the effect of a nolle prosequi states:

> (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. (emphasis added).

This rule, which lies at the heart of State v. Agee, 622 So. 2d 473 (Fla. 1993), can not possibly be applied to cases such as this in which, based on the above analysis, the new charges were not based on the same conduct or criminal episode as the

original leaving the scene charges. Third, an arrest which does not result in a charge does not commence the running of the speedy trial rule. Snead v. State, 346 So. 2d 546 (Fla. 1st DCA 1976); cert. denied, 348 So. 2d 953 (Fla. 1977). [The fact that the defendant was charged with leaving the scene after his initial arrest is similar to the defendant in Snead having been arrested and held on an unrelated charge after his initial arrest to investigate the murder on which he was indicted approximately 1½ years later]

To say that this case is distinguishable from Agee is a vast understatement. Additionally, however, there are significant policy reasons why Agee should not be applied to situations such as this. It would mean that, whenever there was a crime spree case, as soon as the suspect was arrested for any of the crimes involved in the spree, speedy trial time would begin to run as to all such crimes. Thus the State would be deprived of investigative time which might well be necessary as to some of the crimes involved in the spree (which might well be the more serious crimes) or be faced with the undesirable (and pragmatically impossible) alternative of being unable to arrest the defendant for any of the crimes involved in the spree.

Certainly, there could be no credible allegations of constitutional speedy trial violations where the defense never even attempted to show that the delay was unreasonable or

prejudiced the defense in any way. (App.). See, United States v. Gonzalez, 671 F.2d 441 (11th Cir. 1982); cert. denied, 456 U.S. 994 (1982); State v. Condon, 444 So. 2d 73 (Fla. 4th DCA 1984); Gallego v. Purdy, 415 So. 2d 166 (Fla. 4th DCA 1982). Additionally, it should be noted that, although the defense repeatedly alleges that the nolle prosequi was for tactical advantage and the state was unable to give a good faith basis for it (Petitioner's Brief, 9-15), they have been unable to cite any record support for either of these allegations. The simple reason for this is that the trial court ruled before either of these issues became relevant, making it unnecessary and rather absurd for the State to have attempted to present any evidence as to them. (App.).

Except as to the two counts of Leaving the Scene of and Accident With Injury, the district court properly found that the speedy trial rule did not require the defendant's discharge on the crimes of which he was convicted.

The defendant was not deprived of his rights to a speedy trial.

CONCLUSION

Based upon the foregoing reasons and authorities, the decision of the district court, except as to the leaving the scene charges, should clearly be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CHARLES M. FAHLBUSCH
Florida Bar No. **0191948**
Assistant Attorney General
Department of Legal Affairs
4000 Hollywood Blvd., Suite 505-S
Hollywood, Florida 33021
(305) 985-4795

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **GEOFFREY C. FLECK, ESQ.**, FRIEND & FLECK, Sunset Station Plaza, 5975 Sunset Drive, Penthouse 802, South Miami, Florida 33143. on this 27th day of January, 1994.

CHARLES M. FAHLBUSCH
Assistant Attorney General