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IN THE FLORIDA SUPREME COURT

CHRISTIAN FONTANA, :

PETITIONER, :

V. :

CASE NO. 82, 690

EVERETT RICE, ETC., :

District Court of Appeal,
2nd District-No. 93-03142

RESPONDENT, :

_____ :

FILED

SID J. WHITE

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Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT.....	3
<u>QUESTION PRESENTED</u>	4
WHEN A TRIAL COURT HAS DISMISSED CRIMINAL CHARGES, AND THE STATE TAKES AN APPEAL FROM THE ORDER OF DISMISSAL, IS THE TRIAL COURT AUTHORIZED TO CONTINUE THE DEFENDANT ON BOND PENDING STATE APPEAL, UPON A SHOWING OF GOOD CAUSE, OR MUST THE DEFENDANT BE RELEASED ON RECOGNIZANCE?	
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

PAGE NO.

Christian Fontana v. Everett Rice, 1
18 FLW D2359 (Fla. 2d DCA November 3, 1993)

State ex rel., Harrington v. Genung, 7
300 So 2d 271 (Fla. 2d DCA 1974)

OTHER AUTHORITIES

Fla.R.Crim.P. 3.190(c) 5, 6

924.19, Fla.Stat. 4

924.07(1)(a) Fla.Stat. 4

924.071(2) Fla.Stat. 4, 6

Fla.R.App.P. 9.140(e) 5, 6

Fla.R.App.P. 9.140(e)(2) 5, 6, 7

Fla.R.App.P. 9.140(c)(1)(a) 6

924.071(1)Fla.Stat. 7

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CHRISTIAN FONTANA, :
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V. : Case No. 82, 690
EVERETT RICE, ETC. : District Court of Appeal
RESPONDENT, : 2nd District-No. 93-03142
_____:

STATEMENTS OF THE CASE AND FACTS

Petitioner, Christian Fontana, invokes the discretionary jurisdiction of the Supreme Court to review the decision of Christian Fontana v. Everett Rice, 18 FLW D2359 (Fla. 2d DCA November 3, 1993). The decision passes upon a question certified to be of great public importance. The Petitioner was the original Defendant in the trial court and the Petitioner before the District Court of Appeal. The Respondent, Everett Rice, Sheriff, Pinellas County, Florida was the respondent before the District Court of Appeal. This was a petition by the Petitioner for the issuance of a writ of habeas corpus directed to the Sheriff of Pinellas County, Florida.

The Petitioner, Christian Fontana, was arrested on November 2, 1992 for 2 counts of engaging in sexual activity with a child [criminal case no. CRC8809464CFANO-I], alleged to have been committed between July and October 31, 1986. The Petitioner was incarcerated in the Pinellas County Jail for the charges with bond set at \$50,000.00. On September 16,

1993 the trial court granted Petitioner's motion to dismiss the charges on the grounds that the State failed to commence prosecution in the case within the time period provided by the Statute of Limitations. However, the court also ordered that the Petitioner be held in custody pending a hearing scheduled for September 22, 1993, to determine whether the State would appeal the court's order and determine the amount of bond on that appeal. On September 17, 1993 the Petitioner filed a petition for a writ of habeas corpus in the District Court, stating that there were no pending charges or holds on him. On September 22, 1993 the trial court held a hearing on the State's motion to continue the Petitioner on bond pending a State appeal, notice of which was filed on September 22, 1993. The trial court issued an order granting the State's motion to continue the Petitioner on bond pending a State appeal and decreased the bond amount to \$7,500.00. The Petitioner was still unable to make the bond amount. On September 23, 1993 the Petitioner forwarded to the District Court of Appeal a transcript of the argument made in the trial court in support of his petition for relief.

On November 3, 1993, the District Court of Appeal, Second District, denied the Petitioner's petition for a writ of habeas corpus, but certified the case to the Supreme Court as involving a question of great public importance. Petitioner then filed notice to invoke the discretionary jurisdiction of the Supreme Court to review the decision rendered by the District Court of Appeal.

On November 12, 1993 the Petitioner's family was able to post the bond amount and the Petitioner was released on bail.

SUMMARY OF THE ARGUMENT

Petitioner, Christian Fontana, should be released on his own recognizance, pursuant to Florida Rule of Criminal Procedure 3.190(c).

After granting Mr. Fontana's motion to dismiss, the trial court was authorized to hold him in custody for a reasonable amount of time specified by the court, so as to allow the state to file a new information. When that time period elapsed and the state decided to file an appeal from the court's order, rather than file a new information, Mr. Fontana should have been released from custody because there were no pending charges to justify his continuation in custody.

QUESTION PRESENTED

WHEN A TRIAL COURT HAS DISMISSED CRIMINAL CHARGES, AND THE STATE TAKES AN APPEAL FROM THE ORDER OF DISMISSAL, IS THE TRIAL COURT AUTHORIZED TO CONTINUE THE DEFENDANT ON BOND PENDING STATE APPEAL, UPON A SHOWING OF GOOD CAUSE, OR MUST THE DEFENDANT BE RELEASED ON RECOGNIZANCE? [This question has been certified as being one of great public importance.]

In this case, the Petitioner, Christian Fontana, is entitled to be released on his own recognizance. First, the Petitioner relies on Section 924.19, Florida Statutes:

An appeal by the state shall not stay the operation of an order in favor of the defendant except as provided in Section 924.071(2),¹ or when the appeal is from an order granting a new trial.

This statute includes an appeal by the state from "an order dismissing an indictment or information" Fla.Stat. 924.07(1)(a).

Pursuant to this statute, the state's appeal from the order of dismissal of the information by the trial court does not stay the operation of the order in favor of the Petitioner. Therefore, by operation of the order, the Petitioner is presently not charged with any offense, and should automatically be released from custody.

¹Section 924.071(2) only pertains to appeals "from pretrial orders dismissing a search warrant or suppressing evidence".

Second, Petitioner relies on Florida Rule of Criminal Procedure 3.190(c):

Effect of Sustaining a Motion to Dismiss. If the motion to dismiss is sustained, the court may order that the Defendant be held in custody or admitted to bail for a reasonable specified time pending the filing of a new indictment of information. If a new indictment or information is not filed within the time specified in the order, or within such additional time as the court may allow for good cause shown, the defendant, if in custody, shall be discharged therefrom, unless some other charge justifies a continuation in custody. If the Defendant has been released on bail, the Defendant and the sureties shall be exonerated; if money or bonds have been deposited as bail, such money or bonds shall be refunded. (Emphasis supplied)

In this case no new information was filed, and the defendant was not discharged from custody. The language of this rule is unequivocal in that the defendant shall not only be released from custody but also from the necessity of posting bail.

The District Court relied on subsection 2 of the Florida Rules of Appellate Procedure 9.140(e) in declining to release the Petitioner on his own recognizance. The rule states:

Post-Trial Release.

- (1) Appeal by Defendant. The lower tribunal may hear a motion for post-trial release pending a appeal before or after a notice is filed; provided that the defendant may not be released from custody until the notice is filed.
- (2) Appeal by state. An incarcerated defendant charged with a bailable offense shall on motion be released on his own recognizance pending an appeal by the State, unless the lower tribunal for good cause stated in an order determines otherwise. (Emphasis supplied)
- (3) Denial of Post-Trial Release. All orders denying post-trial release shall set forth the factual basis upon which the decision was made and the reasons therefor.
- (4) Review. Review of an order relating to post-trial release shall be by the court upon motion.

The District Court stated that this rule is the only rule precisely governing bail in state appeals and then went on to say "and it appears to cover all authorized state appeals including appeals from orders 'dismissing an indictment or information or any count thereof'" citing Fla.R.App.P. 9.140(c)(1)(a).

Appellate Rule 9.140(e) is entitled "Post-Trial Release" and only applies to appeals by the Defendant or State that are taken after trial. Appellate Rule 9.140(c) is a separate Section entitled "Appeals by the State", and it lists all the appeals the State may take. Rule 9.140(e)(2) does not cover all the state appeals that are enumerated under Rule 9.140(c)(1)(a). Rule 9.140(e)(2) only applies to appeals by the State that are taken post-trial. In addition, even if Rule 9.140(e)(2) could possibly be used for appeals for other than post-trial appeals, the incarcerated defendant would still have to be charged with a bailable offense in order to hold him in custody for good cause stated in an order. Again, in this case the information was dismissed and the Defendant is not charged with any offense.

The District Court in its opinion denying the Petition stated that the Petitioner appeared to ground his argument in part of Section 924.071(2), Florida Statutes (1991):

An appeal by the state from a pretrial order shall stay the case against each defendant upon whose application the order was made until the appeal is determined. If the trial court determines that the evidence, confession or admission that is the subject of the order would materially assist the state in proving its case against another defendant and that the prosecuting attorney intends to use it for that purpose, the court shall stay the case of that defendant until the appeal is determined. A defendant in custody whose case is stayed either automatically or by order of the court shall be released on his own recognizance pending the appeal if he is charged with a bailable offense. (Emphasis supplied)

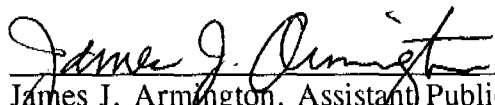
The Petitioner is not relying on that Section. That section only applies to appeals by the State "from pretrial orders dismissing a search warrant or suppressing evidence". Florida Statutes 924.071(1). The District Court went on to cite State ex rel. Harrington v. Genung, 300 So 2d 271 (Fla. 2d DCA 1974) to point out that in that case the District Court interpreted the mandatory language for release in this statute to be merely directory and not mandatory. The court reasoned that if the mandatory language was enforced literally it would constitute a legislative intrusion into the judicial function of setting bail. The District Court then reasoned that this interpretation of the language is reflected in the wording of Florida Rule of Appellate Procedure 9.140(e)(2), upon which they relied in denying the Petition. Under this statute and appellate rule a defendant would still be charged with an offense and under the power of the court to set bail and deny release on recognizance. This statute and appellate rule do not apply in this case because Mr. Fontana is not charged with aailable offense.

CONCLUSION

Because of the reasons and the authorities set forth in this brief, it is submitted that in answer to the certified question when a trial court has dismissed criminal charges, and the state takes an appeal from the order of dismissal, the trial court is not authorized to continue the Defendant on bond pending the State appeal, and the Defendant must be released on recognizance. In addition, the District Court erred in denying Petitioner's Writ of Habeas Corpus and although the Defendant is now out of custody on bond, the Defendant and the sureties should be exonerated, and the Defendant discharged therefrom. Petitioner, Christian Fontana, therefor asks this court to enter its order approving his answer to the question certified to be of great public importance and quashing the decision of the District Court declining to release him on his own recognizance and granting such other relief as shall seem right and proper to the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent to the Office of the Attorney General, Westwood Center, 2002 North Lois, Tampa, Florida 33607, and to Christian Fontana, 7354 A-Pursley Drive, New Port Richey, Florida 34653 on this 3rd day of December, 1993.



James J. Armington, Assistant Public Defender
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