IN THE SUPREME COURT OF FLORIDA

CHRISTIAN FONTANA,

Petitioner,

v. Case No. 82,690

EVERETT RICE, ETC.,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Respondent asserts that the trial court correctly continued the Petitioner on bond pending a state appeal. A trial court has discretion as to the defendant's entitlement to be released on his own recognizance pending an interlocutory appeal by the State. In determining that Fontana should not be released on recognizance, the circuit court properly found that there was "good cause" for continuing Petitioner on bail. Accordingly the Second District Court of Appeal correctly found that the trial court was authorized to continue Petitioner on bond pending a state appeal.

ARGUMENT

ISSUE

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 THE STATE APPEAL, UPON A SHOWING OF GOOD CAUSE, OR MUST THE DEFENDANT BE RELEASED ON RECOGNIZANCE? (CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL)

Respondent asserts that the trial court correctly continued the Petitioner on bond pending a state appeal. §924.071(2), Fla. Stat. states:

> 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 there prosecuting attorney intends to use it for the 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.

In State ex rel. Harrington v. Genung, 300 So. 2d 271 (Fla. 2d DCA 1994) and State v. Shipman, 360 So. 2d 782 (Fla. 4th DCA), cert. denied, 361 So. 2d 835 (Fla. 1978) both courts held that a trial court has discretion as to the defendant's entitlement to be released on his own recognizance pending an interlocutory appeal by the State. In Genung the court reasoned that the

mandatory language of the above section "shall" should be interpreted as directory to prevent legislative encroachment into the inherent judicial function of setting bail.

The Second District in its opinion below stated:

> ...Because the legislature can delineate the categories of persons eligible for bail this court interpreted the statute as authorizing courts to consider bail in this situation. This interpretation is reflected in the wording of the analogous rule of procedure, Florida Rule of Appellant Procedure 9.140(e)(2), which states:
>
> > (2) Appeal by State. An incarcerated defendant charged with a bailable offense shall on motion be released on the defendant's own recognizance pending an appeal by the state, unless the lower tribunal for good cause stated in an order determines otherwise.

(Emphasis supplied.)

> In determining that Fontana should not be released on recognizance, the circuit court made several findings, the sufficiency of which is not contested in the petition. Thus we are not prepared to say the court lacked "good cause" for continuing Fontana on bail. ...

Fontana v. Rice, 18 FLW D2359, 2360 [Fla. 2nd DCA Opinion filed November 3, 1993]

Petitioner argues that §924.071(2) Fla. Stat. only applies to appeals by the State from pretrial orders dismissing a search warrant or suppressing evidence as stated in §924.071(1). Respondent disagrees with this interpretation. §924.071(2)

states "an appeal by the State from a pretrial order shall state a case against each defendant. ..." (emphasis supplied). This language does not indicate that this section applies to only certain pretrial orders. A plain reading of the above statue indicates that it applies to any pretrial order.

Petitioner relies on Florida Rules of Criminal Procedure 3.190(e) which states:

> (e) 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 or 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.

Respondent asserts that as the Second District found below there are virtually no cases which interpret the above statute. As the Second District stated, State v. Lampley, 271 So. 2d 783 (Fla. 3d DCA 1973), deals with exoneration of sureties and suggests that the court may continue bond for a temporary period of time. Respondent agrees with the Second District in its conclusion that:

> ...Appellate rule 9.140(e)(2) is the only rule precisely governing bail in state appeals, and appears to cover all authorized state appeals including appeals from orders "dismissing an indictment or information or any count thereof." Fla.R.App.P. 9.140(c)(1)(A). Accordingly, we conclude that the circuit court acted within its authority in declining to release Fontana on his own recognizance.
>
> Fontana v. Rice, supra at D2360.

The State asserts that for the above reasons the Second District Court of Appeal correctly found that the trial court was authorized to continue Petitioner on bond pending a state appeal.

CONCLUSION

Based upon the foregoing arguments and citations of authority, the State urges this Court to affirm the judgment and sentence rendered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to JAMES J. ARMINGTON, Assistant Public Defender, Criminal Court Complex, 5100 144th Avenue North, Suite B100, Clearwater, Flroida 34622, this 7th day of February, 1994.

Brenda S. Taylor
OF COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

CHRISTIAN FONTANA,

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APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CHRISTIAN FONTANA,

Petitioner,

v.

EVERETT RICE, Sheriff,
Pinellas County, Florida,

Respondent.

CASE NO. 93-03142

Opinion filed November 3, 1993.

Petition for Writ of Habeas Corpus.

Robert E. Jagger,
Public Defender, and
James J. Armington,
Assistant Public Defender,
Clearwater, for Petitioner.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Brenda S. Taylor,
Assistant Attorney General,
Tampa, for Respondent.

PER CURIAM.

Christian Fontana petitions this court for a writ of habeas corpus. We deny the petition, but certify this case to

the Florida Supreme Court as involving a question of great public importance.

Fontana was arrested and charged with two counts of engaging in sexual activity with a child.[1] Unable to post the $50,000 bond required by the trial court, Fontana has remained in custody pending the outcome of the case. On September 16, 1993, the circuit court granted Fontana's motion to dismiss the charges, agreeing that the statute of limitations had expired. The state has appealed the dismissal, and in connection with that appeal moved to continue Fontana's bond. Although the circuit court reduced the bond to $7,500, Fontana takes the position that he is entitled to release on his own recognizance pending the state appeal. His argument appears to be grounded, at least in part, in the following language from 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 . . . . 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.)

However, in State ex rel. Harrington v. Genung, 300 So. 2d 271 (Fla. 2d DCA 1974), this court concluded that the mandatory language of section 924.071(2), if enforced literally,

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[1] § 794.041, Fla. Stat. (1991).

would constitute legislative intrusion into the judicial function of setting bail. Because the legislature can delineate the categories of persons eligible for bail, this court interpreted the statute as authorizing courts to consider bail in this situation. This interpretation is reflected in the wording of the analogous rule of procedure, Florida Rule of Appellate Procedure 9.140(e)(2), which states:

> (2) Appeal by State. An incarcerated defendant charged with a bailable offense shall on motion be released on the defendant's own recognizance pending an appeal by the state, unless the lower tribunal for good cause stated in an order determines otherwise.

(Emphasis supplied.)

In determining that Fontana should not be released on recognizance, the circuit court made several findings, the sufficiency of which is not contested in the petition. Thus we are not prepared to say the court lacked "good cause" for continuing Fontana on bail. Nevertheless, Fontana argues that the circuit court lacked discretion to require the posting of bail because this case, unlike State v. Genung and State v. Shipman, 360 So. 2d 782 (Fla. 4th DCA), cert. denied, 361 So. 2d 835 (Fla. 1978) (which followed Genung), involves the dismissal of charges rather than the suppression of evidence. He asks us instead to look to Florida Rule of Criminal Procedure 3.190(e):

> **(e) 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 or 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.

(Emphasis supplied.)

As with the other rules and statutes discussed in this opinion, there appear to be virtually no cases interpreting this provision. One, State v. Lampley, 271 So. 2d 783 (Fla. 3d DCA 1973), primarily concerns the next sentence in the rule (dealing with exoneration of sureties) but does suggest that the court may continue bond only upon motion by the state and only for a temporary period. Rule 3.190(e) does not, however, indicate what is to be done if the state appeals.[2] Appellate rule 9.140(e)(2) is the only rule precisely governing bail in state appeals, and appears to cover all authorized state appeals including appeals from orders "dismissing an indictment or information or any count thereof." Fla. R. App. P. 9.140(c)(1)(A).[3] Accordingly, we conclude that the circuit court acted within its authority in declining to release Fontana on his own recognizance. We certify

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[2] In the present case it may be impossible to refile the information to cure the problem that occasioned the dismissal - unlike, e.g., an information which is dismissed because it fails to allege a crime.

[3] Court rules are to be construed in much the same manner as statutes. Syndicate Properties, Inc. v. Hotel Floridian Co., 94 Fla. 899, 114 So. 441 (1927). Assuming rules 3.190(e) and 9.140(e)(2) are irreconcilable - and we do not suggest they are - the more specific provision (dealing with bond in the event the state appeals an order dismissing charges) would prevail over the more general (dealing with custody of the defendant after dismissal of charges). See generally Adams v. Culver, 111 So. 2d 665 (Fla. 1959).

the following question to the Florida Supreme Court as being one of great public importance:

> 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 THE STATE APPEAL, UPON A SHOWING OF GOOD CAUSE, OR MUST THE DEFENDANT BE RELEASED ON RECOGNIZANCE?

Petition denied; question certified.

DANAHY, A.C.J., SCHOONOVER and THREADGILL, JJ., Concur.