IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 82,927

STATE OF FLORIDA,

Petitioner,

vs.

GLEN GARY ROHM,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the Appellant in the Fourth District Court of Appeal and the prosecution in a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward County. The Respondent, was the defendant and the Appellee, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will be used to denote the record on appeal in this cause, and the symbol "A" will be used to refer to Petitioner's Appendix, which is a conformed copy of the District Court's opinion, attached hereto.

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case first came before the Fourth District Court of Appeals Petitioner appealed the trial court's granting of Respondent's motion for discharge; the court reversed the order granting discharge, finding that Petitioner was entitled to the benefit of the 15 day "window" period pursuant to Rule 3.191(i)(2) and (3) Fla. R. Crim. P. [now Rule 3.191 (p)(2) and (3)] (R 10-11). State v. Rohm, 596 So.2d 1271 (Fla. 4th DCA 1992). Mandate issued on May 8, 1992 (R 9).

On May 15, 1992, Respondent filed his demand for speedy trial (R 12). Also on May 15, 1992, Petitioner filed its motion for extension of time for speedy trial due to exceptional circumstances as well as its notice of hearing setting said motion for hearing on May 18, 1992 (R 13-15). On May 18, 1992, Respondent filed his motion for discharge[1] (R 16-17). Apparently, a preliminary hearing was held on the motion for discharge on the day it was filed (R 7).

On May 28, 1992, Respondent's motion for discharge came on for hearing before the trial court; Petitioner moved for a continuance due to exceptional circumstances, based on the fact that the victim, without whose testimony Petitioner was unable to proceed, was in the Merchant Marines and stationed in Indonesia until August 20 (R 4, 14-15). The trial court denied this motion finding that

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[1] Although the Certificate of Service on this motion for discharge states that it was furnished to the State on May 26, 1992, the copy of the motion contained in the record in this case reflects that the motion was filed in open court on May 18, 1992; further, the prosecutor acknowledged that the motion was in fact filed on May 18, 1992 (R 4, 7, 16-17).

there was a limit to how long it could continue this case, and that Petitioner could have taken a video taped deposition to perpetuate the victim's testimony, but had not (R 4-5). Petitioner noted that it had been ready for trial prior to the trial court's initial granting of the motion for discharge, and that the order had been entered during **voir dire** (R 8-9).

Petitioner also argued that the trial court should strike Respondent's motion as untimely because Rule 3.191(m) provided that Petitioner was entitled to 90 days after issuance of mandate in which to bring the case to trial, and as 90 days had not expired since the issuance of mandate in this case, the motion for discharge was untimely (R 5-6). The trial court denied this motion as well, finding that the opinion of the Fourth District only gave Petitioner the benefit of the 15 day window period, did not authorize an additional 90 days and had the Fourth District intended an additional 90 days, the opinion would have so indicated (R 6-7). Finding that the window time periods had expired, the trial court granted Respondent's motion for discharge (R 7, 18).

Petitioner appealed and the Fourth District affirmed holding that the 15 day window and not the 90 day compliance with mandate period applied (A 1-5). The court determined that the plain language of Rule 3.191(m) Fla. R. Crim. P. (1993)[2], applied the 90 day period only to instances where the appellate court action made possible a **new trial** for the defendant, reasoning that the state was not entitled to the 90 day period when it had failed to comply

[2] Formerly Rule 3.191(g) Fla. R. Crim. P. (1985).

with the intent of the speedy trial rule prior to the appeal of the order erroneously granting the motion for discharge. The court also certified, as a question of great public importance, the following:

> When speedy trial time provided in rule 3.191 (a) has fully run, and the trial court grants a timely motion for discharge during the unexpired 15-day window period which is reversed on appeal, does the state on re,and have the 15-day window period to bring the defendant to trial, or instead the 90-day appellate mandate period? [Footnotes omitted].

(A 1-2).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal incorrectly interpreted Rule 3.191(m) Fla. R. Crim. P. to allow the state a 90 day period in which to bring a defendant to trial, **only** in instances where an appellate court or the trial court has granted a new trial. The plain meaning of the rule, and this Court's prior interpretation of the rule, is that a uniform 90 day period after the issuance of mandate is provided in which a defendant shall be brought to trial after an appeal by the state, regardless of the nature of the state's appeal.

ARGUMENT

ON REMAND, AFTER AN APPELLATE COURT HAS REVERSED A TRIAL COURT'S ORDER ERRONEOUSLY GRANTING DISCHARGE, THE 90 DAY TIME PERIOD PROVIDED FOR IN RULE 3.191(m), FOR BRINGING A DEFENDANT TO TRIAL SHOULD APPLY.

Petitioner submits the Fourth District's decision below interprets the meaning of Rule 3.191(m) Fla. R. Crim. P., contrary to this Court's prior interpretations of that rule in Lowe v. State, 437 So. 2d 142 (Fla. 1983), and State v. Jenkins, 389 So. 2d 971 (Fla. 1980).

The Fourth District held that the "plain language" of Rule 3.191(m), providing for a 90 day period in which the state must bring a defendant to trial after an appeal by either the state or the defendant, indicated that the 90 day period applied **only** to situations in which an appellate mandate or trial court order, makes possible a **new trial or retrial** for the defendant. While quoting the entire rule, the court gave meaning to only a portion of the language, ignoring the remaining language of the rule, language which precedes that relied upon by the Fourth District. Respondent submits that the rule must be read and interpreted in its entirety. Rule 3.191(m) provides:

> **Effect of Mistrial; Appeal; Order of New Trial.** A person who is to be tried again or whose trial has been delayed by an appeal by the state or the defendant shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of the mandate, order, or other notice of whatever form from an appellate or other

> reviewing count that makes possible a new trial for the defendant, whichever is last in time. If the defendant is not brought to trial within the prescribed time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p).

Clearly, the caption of the rule, "Effect of ... Appeal", as well as the express language of the rule "a person ... whose trial has been delayed by an appeal by the state ... shall be brought to trial within 90 days from ... the date of receipt of mandate" indicates that a uniform 90 day period is provided for bringing a defendant to trial after an appeal by the state. This is the precise interpretation given Rule 3.191(m) by this Court in Lowe, supra at 144. See also: Jenkins, supra at 976. If not, then the language "whose trial has been delayed by an appeal by the state or a defendant" has no meaning. Indeed, in Lowe, this Court expressly noted that while the former provisions of Rule 3.191(g), now (m), did not apply to cases where the defendant had never been brought to trial, under the new provisions of the rule, the 90 day provision was applicable to all state appeals. Id. at 975. Thus the Fourth District's interpretation of the rule is incorrect and must be quashed.

As part of its reasoning in holding that there is a distinction between new trials or retrials and "original" trials, the court stated that with respect to new trials, the state had already met its burden of bringing the defendant to trial within the appropriate speedy trial time and the new trial was the result of a trial being reversed at the instance of the defendant. The court reasoned that in "original" trial situations, the state could

not point to full compliance with the rule's intent of protecting a defendant's speedy trial rights, not could the state point to any presumption of correctness as to the judgment as it could in cases where a new trial had been granted at the instance of the defendant. Thus, the court determined that the state was not entitled to the benefit of the provisions of Rule 3.191(m) except in circumstances where a new trial had been ordered. Such reasoning is simply incorrect.

The major, and most obvious problem with the decision below is that it is contrary to this Court's decisions, and the rule's intent, regarding the timing of a defendant's trial after a state appeal from an erroneous order granting suppression, or dismissal. In those instances the state cannot show it has complied with the intent of the speedy trial rule, nor can it point to a presumption of correctness as to a judgment, because the appeal preceded the defendant's trial. Yet in those instances, this Court had held that the 90 day rule applies, regardless of the amount of time which may have expired under any prior running of speedy trial time. Lowe supra; Jenkins, supra; See also: State v. Ferris, 467 So.2d 765 (Fla. 4th DCA 1985); State v. White, 436 So.2d 926 (Fla. 2nd DCA 1983), review denied 446 So.2d 100 (Fla. 1984); State v. Sagre, 435 So.2d 977 (Fla. 3rd DCA 1983); State v. Jowais, 423 So.2d 409 (Fla. 5th DCA 1982).

Further, there can be no presumption that the state has met its burden of fully complying with the initial speedy trial time in all instances where a new trial has been ordered. It may be that

trial was begun after a motion for discharge, but within the 15 day window period, or that the speedy trial time has already expired, but the defendant has failed to make an issue of it. Additionally, although there is a presumption of correctness as to a judgment of guilt after trial, that presumption can be overcome, hence trials are reversed and remanded for new trial, sometimes for the state's misconduct, such as discovery violations or prosecutorial misconduct, yet in those instances, the 90 day rule applies, notwithstanding the state's noncompliance with the rules of criminal procedure.

Clearly, whether the state, or anyone else, has complied with the rules of criminal procedure is not controlling in interpreting Rule 3.191(m); obviously, where the state fails to comply with the speedy trial rule, it will not be able to successfully prosecute an appeal of an order of discharge and the provisions of Rule 3.191(m) will not ever be at issue. Rather the speedy trial rule was "adopted by the court in order to promote the efficient operation of the criminal justice system in this state as well as to minimize the hardships imposed on accused persons resulting from lengthy delays while awaiting trial." State v. Barnett, 366 So. 2d 411, 415 (Fla. 1978). Contrary to the Fourth District's implication of misconduct on the part of Petitioner, the instant case was not delayed by the state's disregard of the defendant's speedy trial rights, but the state's appeal of the trial court's **incorrect** ruling, on Respondent's motion for discharge, that the state was not entitled to the benefit of the 15 day window period provided

for in Rule 3.191(p). State v. Rohm, 596 So. 2d 1271 (Fla. 4th DCA 1992). It must be noted that the erroneous ruling in this cause occurred during **voir dire** when the state was ready and able to bring Respondent to trial (R 8-9).

Petitioner submits that the purpose of the 90 day rule is establish a reasonable and uniform time period in which the trial court, the state, and the defendant can obey the appellate court's mandate. Obviously it is impossible to predict when an appellate court will issue its opinion, or order on rehearing, in an appeal. While issuance of mandate may be easier to predict, the trial court, of course, has no jurisdiction to take any action in the case until mandate has issued. To require a trial court to clear its docket and schedule a trial, or require the state or a defendant to be prepared for trial within 15 days of issuance of mandate would be onerous if not impossible. It must be remembered that Petitioner in this case was prepared to bring Respondent to trial within the provisions of the speedy trial rule, **but for** the trial court's prior erroneous ruling. As Petitioner was not at fault for the delay in Respondent's trial, Petitioner should not be punished for taking a meritorious appeal by requiring it to be ready for trial within 15 days of a mandate which no one knows for certain when it will issue[3]. Similarly, it would be equally unfair to force a defendant, who has previously demanded his speedy trial

[3] Logically, since there is no jurisdiction in the lower court until issuance of mandate, the lower court lacks the power to issue subpoenas for trial, even assuming one could predict when trial court occur.

rights, to waive them by taking a continuance where he could not be ready for trial within 15 days of issuance of mandate. Clearly the rule was intended to provide a uniform, but not unduly long, period of time in which to obey an appellate court's mandate, which is fair to all parties.

Here, as in Lowe v. State, supra, Respondent's motion for discharge was untimely, as it was filed prior to expiration of the 90 day speedy trial time which began to run anew on the date of issuance of mandate in this case, i.e. May 8, 1992 (R 9). Lowe at 144. As such, the trial court erred in granting Respondent's motion for discharge, the Fourth District's erred in affirming the lower court's order and the lower court's order must be reversed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court QUASH the decision of the Fourth District Court below and REVERSE the decision of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Petitioner" has been furnished by U.S. Mail to: GREG ROSS, Esquire, and DVORA WEINTREB, Esquire, 400 S.E. Eighth Street, Ft. Lauderdale, FL 33316, this 24th day of January, 1994.

Of Counsel

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1993

STATE OF FLORIDA,

Appellant,

v.

GLEN GARY ROHM,

Appellee.

CASE NO. 92-1792
L.T. Case No. 90-19971CFB

Opinion filed December 8, 1993

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

Appeal from the Circuit Court for Broward County, Robert B. Carney, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellant.

Greg Ross and Dvora Weinreb of Law Offices of Greg Ross, P.A., Fort Lauderdale, for appellee.

FARMER, J.

When the speedy trial time provided in rule 3.191(a)[1] has fully run, and the trial court grants a timely motion for discharge during the unexpired 15-day window period[2] which is reversed on appeal, does the state on remand have the 15-day window

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[1] See Fla. R. Crim. P. 3.191(a) (1993) ("Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime by indictment or information shall be brought to trial * * * within 175 days if the crime charged is a felony.").

[2] See Fla. R. Crim. P. 3.191(p)(3) (1993) ("Not later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall hold a hearing on the notice and, unless the court finds that one of the reasons set forth in subdivision (j) exists, shall order that the defendant be brought to trial within 10 days.").

as the state contends. We begin as we must with the precise text of the rule, which we repeat here:

> "(m) Effect of Mistrial; Appeal; Order of New Trial. A person who is to be tried again or whose trial has been delayed by an appeal by the state or the defendant shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of the mandate, order, or notice of whatever form from an appellate or other reviewing court that makes possible a new trial for the defendant, whichever is last in time. If a defendant is not brought to trial within the prescribed time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p)." [e.s.]

We read the above text -- especially the highlighted portion which is the portion urged by the state as controlling under the facts of this case -- to apply only to appellate mandates which "make possible a new trial for the defendant."

In other words, we construe the plain language of this rule to create four possible triggering events for the 90-day period. The first is a mistrial, in which event the period begins to run from the date on which the trial court declared the mistrial. The second is an unappealed order granting a new trial, in which event the period begins to run on the date of the trial court's order granting the new trial. The third is an unappealed order granting a motion in arrest of judgment, in which event the period begins to run on the date of entry of the trial court's order. The fourth (and last) is a mandate from a higher court making a new trial possible, in which event the period begins to run from the date on which the trial court receives the mandate.

period to bring the defendant to trial, or instead the 90-day appellate mandate period?[3] Under the facts of this case, we hold that the 15-day window period applies and affirm the court's discharge after remand.

In the first appeal in this case, State v. Rohm, 596 So. 2d 1271 (Fla. 4th DCA 1992), we reversed the speedy trial discharge because the court failed to give the state the 15-day window period in which to bring the defendant to trial. Our reversal was based on State v. Kruger, 539 So. 2d 565 (Fla. 4th DCA 1989), which was factually identical, i.e., a discharge within -- rather than after -- the 15-day window period. In both cases, however, our remand was unspecific; we simply ordered further proceedings consistent with the reversal. We did not specify that the trial was to occur, if at all, within any identified period. The trial court here concluded that further proceedings consistent with the reversal meant that the state had to bring defendant to trial within the 15-day period.

In arguing error, the state relies on the text of rule 3.191(m) and Lowe v. State, 437 So. 2d 142 (Fla. 1983), to stand for the universal proposition that all criminal trials after an appellate mandate are governed by the 90-day provision of rule 3.191(m). We do not read either rule 3.191(m) or Lowe as broadly

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[3] See Fla. R. Crim. P. 3.191(m) (1993) ("A person * * * whose trial has been delayed by an appeal by the state * * * shall be brought to trial within 90 days from * * * the date of receipt by the trial court of a mandate * * * from an appellate or other reviewing court that makes possible a new trial for the defendant * * *.").

We distinguish, as the drafters of this rule so obviously did by the text they chose, between trials, on the one hand, and new trials or retrials, on the other. In the case of a new trial, the state has met its initial burden to bring the defendant to trial within the initial speedy trial period. The result of that trial has been reversed at the instance of the defendant, and no double jeopardy consideration prevents a retrial (or new trial) from taking place. In that situation, the rule draws a speedy trial compromise between giving the state another 175 days to begin the new trial, on the one hand, and the defendant's legitimate interest in having some greatly reduced period, on the other.

No such analysis is justifiable when, as here, the state has already failed to bring the defendant to trial within the initial period. It cannot point to its full compliance with the rule's intent before the defendant invoked his speedy trial right. It cannot point to any presumption of correctness as to the resulting judgment and its reliance thereon in releasing its witnesses, as a prejudice arising from the reversal. On the other hand, subdivision (p)(3) of the rule still gives the state one last "window" period of 15 days to remedy its tardiness, which the trial judge is not free under the rule to take away.

When a trial court incorrectly denies even that period to the state, we are obliged under the rule to reverse, but not to start trial within 90 days as in the case of a new trial made possible by an appellate court's mandate, but only within the 15-day window period prescribed by rule 3.191(p)(3). Cf. State v.

Eubanks, 18 Fla. L. Weekly D2430 (Fla. 4th DCA Nov. 17, 1993) (trial court's discharge after expiration of appellate mandate period, but without according state 10-day portion of window period after hearing on motion for discharge, requires reversal with instructions to bring to trial within 10-day period).

As for Lowe, also relied upon by the state, it plainly did not address the situation we face here, where a trial judge granted a timely filed motion for discharge after first affording the state the window period to bring defendant to trial. In this case, the mandate was received by the trial court on May 8th, defendant filed a motion for discharge on May 18th, and on May 28th the trial court granted the motion. Hence the state had more than the 15-day window period to bring defendant to trial but made no attempt to do so. In fact at the May 28th hearing the state sought a continuance until at least August. We simply find no error in the trial court's decision. If we are wrong, we have the luxury of certifying the issue stated in the first paragraph of this opinion to the supreme court as one of great public importance.

AFFIRMED; QUESTION CERTIFIED.

DELL, C.J., and GUNTHER, J. concur.