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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,231

D.C.A. CASE NO. 93-2676

BRUNO ABREU,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

REPLY BRIEF OF PETITIONER ON THE MERITS

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WHETHER A TRIAL COURT MAY CONSIDER, AND RULE ON, A MOTION FOR MITIGATION UNDER RULE 3.800(B), FLORIDA RULES OF CRIMINAL PROCEDURE, AFTER THE EXPIRATION OF THE SIXTY-DAY PERIOD PRESCRIBED UNDER THE RULE, WHERE THE MOTION HAS BEEN TIMELY FILED, THE COURT HAS COMMENCED THE HEARING ON THE MOTION WITHIN THE SIXTY-DAY PERIOD, AND AN EXTENSION HAS BEEN GRANTED UNDER RULE 3.050, FLORIDA RULES OF CRIMINAL PROCEDURE

ARGUMENT

A TRIAL COURT MAY CONSIDER, AND RULE ON, A MOTION FOR MITIGATION UNDER RULE 3.800(B), FLORIDA RULES OF CRIMINAL PROCEDURE, AFTER THE EXPIRATION OF THE SIXTY-DAY PERIOD PRESCRIBED UNDER THE RULE, WHERE THE MOTION HAS BEEN TIMELY FILED, THE COURT HAS COMMENCED THE HEARING ON THE MOTION WITHIN THE SIXTY-DAY PERIOD, AND AN EXTENSION HAS BEEN GRANTED UNDER RULE 3.050, FLORIDA RULES OF CRIMINAL PROCEDURE

The trial court in this case had jurisdiction to consider, and rule on, Petitioner's motion for mitigation. In the present case, Petitioner timely filed a motion for mitigation. The trial court timely commenced a hearing on the motion and granted an extension of time under Rule 3.050, Florida Rules of Criminal Procedure, to complete the hearing.

Respondent contends in its brief on the merits that the appellate courts of this State, with the exceptions of the First and Second District Courts of Appeal in State v. Golden, 382 So.2d 815 (Fla. 1st DCA 1980), and State v. Smith, 471 So.2d 1347 (Fla. 2d DCA 1985), have consistently held that the time limitation of

Rule 3.800(b), Florida Rules of Criminal Procedure, is jurisdictional. It is interesting, however, that only in Golden, supra, and Smith, supra, were there facts similar to the facts presented in the case at bar. None of the cases cited by Respondent in its brief on this point at pages 9 and 10 involve the commencement of a hearing within the sixty (60) day period and the termination of the hearing and ruling beyond the sixty day period, and the applicability or effect of Rule 3.050, Florida Rules of Criminal Procedure, to the proceedings.[1]

Respondent contends that the Rule 3.800(b) does not provide for any extensions or exceptions, "meaning that the legislature intended any modification or mitigation to take place within the sixty (60) day time frame." (Respondent's Brief, p. 11).[2] By analogy, Respondent cites to Rule 3.191, Florida Rules of Criminal

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[1] Indeed, Carter v. State, 608 So.2d 562, 563 n.1 (Fla. 1st DCA 1992), cited by Respondent in its string citation, specifically acknowledged the applicability of the analysis in Golden supra, and Smith, supra, to those situations where the trial court held a hearing within the sixty day period but entered its order after the expiration of this period. Additionally, in Grosse v. State, 511 So.2d 689 (Fla. 4th DCA 1987), rev. den., 519 So.2d 987 (Fla. 1988), also cited by Respondent, the Fourth District noted that it is the responsibility of the moving party to schedule a hearing on a motion to mitigate within the sixty day period. The defense did not do so in Grosse, and the Fourth District found that under these circumstances, the decisions in Golden supra, and Smith, supra, were inapposite. Grosse v. State, supra, 511 So.2d, at 689.

[2] As a matter of constitutional imperative, only the Supreme Court has the power to adopt rules of practice and procedure for Florida courts, not the legislature. See Art. V., Section 2(a), Florida Constitution; Markert v. Johnston, 367 So.2d 1003, 1005 n. 8 (Fla. 1979). See also R.J.A. v. Foster, 603 So.2d 1167 (Fla. 1992).

Procedure, to suggest that any time frame exceptions or extensions must be provided within the rule itself.

First, there is no authority for the proposition that all time frame exceptions and extensions must be provided within the specific procedural rules themselves. For example, Rule 3.050, Florida Rules of Criminal Procedure, by its very wording, applies to all of the rules of criminal procedure except those specifically exempted.[3] Interestingly, while the appellate court noted below that the defense relied on Rule 3.050, Florida Rules of Criminal Procedure, for an extension within the sixty-day period, the Third District did not discuss or explain why this rule was inapplicable to the cause.

Respondent suggests that the decision in State v. Evans, 225 So.2d 548 (Fla. 3d DCA), cert. den., 229 So.2d 261 (Fla. 1969), cert. den., 397 U.S. 1053, 90 S.Ct. 1393, 25 L.Ed.2d 668 (1970), supports its argument, noting that the appllate court in Evans

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[3] The Rule provides as follows:

Rule 3.050. Enlargement of Time

"When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for good cause shown may, at any time, in its discretion (1) with or without notice, order the period enlarged if a request thereof is made before the expiration of the period orginally prescribed or extended by a previous order or (2) upon motion made and notice after the expiration of the specified period, permit the act to be done when the failure to act was the result of excusable neglect; but it may not, except as provided by statute or elsewhere in these rules, extend the time for making a motion for new trial, for taking an appeal, or for making a motion for a judgment of acquittal."

decried the possibility of "indefinite supervision" by the trial court of all legal sentences it imposes. Id., 225 So.2d, at 550. However, in Evans the defendant's position had been that the mere filing of the motion for mitigation within the sixty day period was sufficient to permit the trial court to act on the motion "at any time." Id. Such is not Petitioner's position. Unlike the situation in Evans, a hearing was commenced within the sixty day period; a motion was made under the extension provisions of current Rule 3.050; no argument was made for an indefinite delay of the hearing or a ruling; and no attempt was made to vacate, rather than reduce, Petitioner's sentence.

Respondent argues, without any authority, that Rule 3.050, Florida Rules of Criminal Procedure, should not be deemed applicable to "discretionary 'grace' sentencing statutes." (Respondent's Brief, p. 12). The fact remains, however, that Rule 3.050 clearly applies to the time frames provided "by these rules..." It has been recognized that all related rules of procedure should be construed in para materia. See Lehman v. Cloniger, 294 So.2d 344, 347 (Fla. 1st DCA 1974); Dibble v. Dibble, 377 So.2d 1001, 1003 (Fla. 3d DCA 1979).[4] Moreover, procedural rules should be given a construction calculated to further justice, and not to frustrate it. Singletary v. State, 322 So.2d 551, 555 (Fla. 1975). Access to courts is a constitutionally recognized

[4] See also Grosse v. State, supra, 511 So.2d, at 689 (interplay of Rule 3.060, Florida Rules of Criminal Procedure, considered in Rule 3.800(b) proceedings).

right and any restrictions thereon should be liberally construed in favor of the right. Lehman v. Cloniger, supra, at 347.[5]

Respondent further argues that Petitioner had not demonstrated "good cause" under Rule 3.050, Florida Rules of Criminal Procedure, sufficient to justify the applicability of the rule to the proceedings in this case. (Respondent's Brief, pp. 13-14). Contrary to Respondent's argument, it is clear that Petitioner's court-appointed counsel did everything humanly possible to expeditiously bring the matter to the trial court's attention and to seek protection for his client under the rules.

The record shows that on March 12, 1993, the Office of the Public Defender orally announced a conflict of interest in the case. (R. 20; T. 5). On August 20, 1993, the trial court appointed Joseph Pecoraro, Esq., as attorney for Petitioner in his motion to mitigate sentence. The court ordered the appointment nunc pro tunc to August 3, 1993. (R. 17; T. 7). Petitioner's new counsel had presented the court with a motion and order to transport Petitioner to Dade County, Florida, in order to assist him in the presentation of the motion to mitigate. An order for transport was entered on August 12, 1993. (R. 33-34). As of August 19, 1993, it was still

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[5] In construing rules of procedure, the principles of statutory construction apply. Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981). Thus, it is clear that where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused. See Scates v. State, 603 So.2d 504, 505 (Fla. 1992); State v. Camp, 596 So.2d 1055, 1056 (Fla. 1992); Lamont v. State, 610 So.2d 435, 437-438 (Fla. 1992); Trotter v. State, 576 So.2d 691, 694 (Fla. 1990). Similarly, any question as to the applicability of Rule 3.050, Florida Rules of Criminal Procedure, to proceedings under Rule 3.800(b), Florida Rules of Criminal Procedure, should be resolved in favor of Petitioner.

unclear whether Petitioner had been transported back to Dade County. (1ST. 2-3).

On August 20, 1993, Petitioner filed a Motion to Mitigate and a Motion for Extension of Time within which the motion to mitigate may be heard. (R. 35-37). On August 24, 1993, an additional hearing was calendared before the trial judge. Defense counsel, seeking to preserve Petitioner's right to pursue mitigation of sentence, requested that the court commence the mitigation hearing prior to the expiration of the 60-day period. (2ST. 4-7; 2ST. 10). After a short recess, the trial court obtained copies of the trial transcripts from the Office of the Public Defender. The defense offered the transcripts into evidence and the court accepted the transcripts for review. (2ST. 21-23). The court announced a recess until a future date.

Irrespective of this record, Respondent then blames the mitigation hearing court's desire to review the trial transcripts for the delay in the proceedings. (Respondent's Brief, pp. 13-14).[6] Without argument, Respondent simply concludes that neither Petitioner's late transport nor the recent appointment of defense counsel sufficed to provide "good cause" under Rule 3.050. Petitioner is at a loss to imagine any scenario more worthy of the term "good cause" than the facts shown on the record below.

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[6] Perhaps, Respondent now would have been satisfied by a decision from a judge totally unaware of the testimony and evidence presented at the trial. However, the prosecutor at the trial level unambiguously informed the trial court judge that he would "have to know everything that there is to know about this case, which means we need to get the transcript to the Court..." (2ST-18).

Respondent next argues that the trial court's acceptance of the trial transcripts, and thus commencing the hearing on the mitigation motion, was nothing but a "sham" and a "procedural ploy" which should be disregarded by this Court. (Respondent's Brief, pp. 14-15).[7] Respondent does not mention, however, that substantial constitutional rights are governed by court actions, similar to those conducted below. For example, double jeopardy attaches when a jury is empanelled and sworn, or, in a bench trial when the judge begins to receive evidence. United States v. Martin Linen Supply Co., 430 U.S. 564, 569, 97 S.Ct. 1349, 1353, 51 L.Ed.2d 642 (1977). Neither procedure is considered a "sham" or a "procedural ploy" by the courts.[8]

Moreover, Respondent's reliance on State v. Allen, 553 So.2d 176 (Fla. 4th DCA 1989), on this point is wholly misplaced. In Allen, the trial court attempted to use the mitigation rule to obviate the effect the sentencing guidelines. The appellate court in Allen noted that such an action resulted in an illegal sentence, since it involved a sentence which could not have been imposed initially. There is no argument that the sentence ultimately

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[7] It is significant that Respondent, having staked out its position on this issue at the time of the trial court's action, chose not to seek any extraordinary relief by writ to prohibit further action by the trial court, but rather, proceeded with the hearings in their totality. Only after the unfavorable disposition of the matter in the trial court, has Respondent vehemently expressed its shock and indignation of what it considers the trial court's "end run" around the time limitations of Rule 3.800(b).

[8] Indeed, it is not uncommon for prosecutors to seek the use of this procedure to defeat discharge under the speedy trial rule.

imposed by the trial court in this case was illegal in any manner. Here, the trial court sentenced Petitioner to 30 years, within the guideline range of 27 years to life imprisonment.

Finally, Respondent argues that neither Smith, supra, nor Golden, supra, should be interpreted to create a jurisdictional exception beyond the unusual factual situations confronted by those courts. (Respondent's Brief, pp. 15-16). In particular, Respondent maintains that the movants in Smith and Golden were "blameless defendants who made every attempt to comport with the dictates of Rule 3.800(b)." (Respondent's Brief, p. 17). Respondent does not explain how Petitioner's position in this case is any more blameworthy. In fact, the procedural history previously described herein, clearly shows how Petitioner and his counsel did everything humanly possible to bring the mitigation matter to the attention of the trial court and commence a hearing and consideration of the mitigation motion within the sixty (60) day period. Petitioner could not control his own transportation to the circuit court for the hearing on the motion to mitigate. The late appointment of counsel to assist him, and counsel's indefatigable efforts to resolve the matter expeditiously, are clearly set forth on the record.

Based on the foregoing, it is clear that the trial court ruled within its discretionary power to extend the time to consider and further act upon Defendant's motion to mitigate.

CONCLUSION

Based on the foregoing, petitioner requests this Court quash the decision of the Third District Court of Appeal decision in this cause and direct that Petitioner's sentence be affirmed as reduced 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 was mailed to Joni B. Braunstein, Esq., the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, P.O. Box 013241, Miami, Florida, 33101, on this 28th day of April, 1995.

_____
J. RAFAEL RODRIGUEZ