IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,019

THE STATE OF FLORIDA,

Petitioner,

-vs-

WILLIAM R. WOODRUFF,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On July 4, 1993, Respondent, William R. Woodruff ("Defendant") was arrested in Dade County and issued the following traffic tickets: two for DUI with serious injury, two for DUI with property damage and one for driving while his license was suspended. The County Court automatically arraigned the Defendant. Defendant pled not guilty and a trial date was set.

On or before July 26, 1993, the court clerk transferred the tickets to circuit court. A motion for transfer was never filed and the record does not reflect how the transfer was effected. On July 26, 1993, Defendant was set for arraignment in Circuit Court. Subsequently, arraignment in Circuit Court was reset for August 4, 1993.

On August 4, 1993, Appellant/Petitioner ("the State") filed a felony information charging the Defendant with the following: one count of felony DUI, two counts of DUI property damage and one count each of DUI personal damage, DUI impairment and driving while his license was suspended.

On October 4, 1993, the speedy trial period expired in the County Court case.

On October 15, 1993, Defendant filed a notice of expiration of the speedy trial term for the County Court tickets.

On November 18, 1993, Defendant filed a motion in Circuit Court to dismiss the felony information on double jeopardy grounds.

On December 17, 1993, the Court granted Defendant's motion to dismiss the felony information.

On December 27, 1993, the State filed a timely notice of appeal.

On April 19, 1995, the District Court of Appeal, Third District, affirmed the lower court's order dismissing the felony information. (Ex. 1).[1]

On May 4, 1995, the State filed a motion for rehearing, certification and clarification. (Ex. 2).

On May 31, 1995, the District Court of Appeal, Third District denied the State's motion for rehearing, certification and clarification without opinion. (Ex. 3).

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[1] "Ex." refers to the exhibits in the attached appendix.

The State filed a timely notice to invoke the discretionary jurisdiction of the Supreme Court.

POINT ON APPEAL

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THIS CASE, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN NESWORTHY v. STATE, OR WITH THE DECISION OF THIS COURT IN REED v. STATE?

SUMMARY OF THE ARGUMENT

The State filed the felony information within thirty days of the incident that gave rise to the misdemeanor and felony charges and therefore the State should have been allowed to bring the Defendant to trial within the speedy trial period applicable to felonies regardless of the speedy trial status of any previously filed misdemeanor.

The District Court of Appeal, Third District, expressly and erroneously relied upon, and misapplied a decision of this court that did not address, either in its opinion or in its underlying rationale, the nolle prosequi of a misdemeanor.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THIS CASE, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN NESWORTHY v. STATE, AND OF THIS COURT IN REED v. STATE.

The decision of the District court of Appeal of Florida, Third District, in this case states that the expiration of the speedy trial period of a previously filed misdemeanor constituted an estoppel preventing the State from filing a felony information, predicated on the same incidents, and from bringing the Defendant to trial on said information within the speedy trial period for felonies. This decision is, therefore, in express and direct conflict with the decision of the district Court of Apepal of Florida, Fifth District, in Nesworthy v. State, 648 So. 2d 259 (Fla. 5th DCA 1994), a case that is factually indistinguishable from this one.

In Nesworthy, the Court stated:

> It appears to us most logical, and most consistent with the scheme set forth in Rule 3.191, that notwithstanding the speedy trial status of any previously filed misdemeanor, a felony may be charged and the defendant brought to trial within the speedy trial time frames applicable to felonies.

Nesworthy, at 260 (footnotes omitted)

In Nesworthy the accident out of which the criminal charge arose occurred on November 5, 1993. On January 5, 1993, Defendant was served with a notice to appear on a charge of misdemeanor driving under the influence. On April 20, 1993, a hearing was held on Nesworthy's motion for discharge under the speedy trial rule. The parties set a date for a plea; however, two days later the state nolle prosequied the misdemeanor DUI charge. Approximately one month later, the state filed a two-count information charging DUI with serious bodily injury, a felony, and DUI with personal or property damage, a misdemeanor. On June 2, 1993, Nesworthy moved for speedy trial discharge. The court granted discharge on the misdemeanor but not on the felony.

The District Court of Appeal also expressly and erroneously relief upon and applied Reed v. State, 20 Fla. L. Weekly S34 (Fla. Jan. 19, 1995).[2]

In Reed, the State filed a second felony information some 245 days after Reed's arrest. The court held that the speedy trial period began to run from the date of Reed's arrest and that the nolle prossing of the initial felony charges did not toll the speedy trial period.

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2 See Exhibit 1, note 5.

It is indisputable that Reed does not address, either in its opinion or in its underlying rationale, the nolle prosequi of a misdemeanor. Nor would it further good public policy to prevent the State from filing, pursuant to proper investigation, a felony information within the time frame applicable to felonies simply because of the expiration of the speedy trial period for a misdemeanor charge predicated on the same criminal episode. This is especially true where, as in Dade County, traffic tickets are automatically filed in county court in Dade County.

It appears from its opinion that the District Court of Appeal placed undue weight on the fact that the State purported to nolle pros the misdemeanor charges after the speedy trial period applicable to misdemeanor had expired. (Ex. 1, note 1). The District Court's opinion in Nesworthy suggests that whether or when the misdemeanor charges were nolle prossed is entirely irrelevant, provided that the felony is charged and the Defendant brought to trial within the speedy trial frame applicable to felonies.

Similarly, the Third District appears to have placed undue weight on the fact that the misdemeanors and felonies were not properly consolidated. (Ex. 1, note 2). Whether the misdemeanors and felonies were ever consolidated is also irrelevant. Nesworthy.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court review the decisions of the District Courts of Appeal which are in direct and express conflict.

Respectfully submitted,

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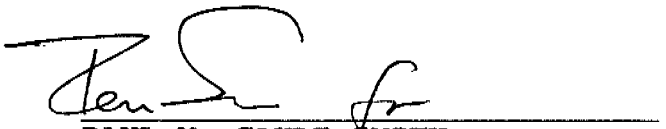
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON JURISDICTION** was furnished by mail to **Amy Ronner, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125** on this 10th day of July, 1995.



PAUL M. GAYLE-SMITH
Assistant Attorney General

/nab

EXHIBIT 1

94-13227-O

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1995

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 94-309

WILLIAM R. WOODRUFF, **

Appellee. ** 93-22117

Opinion filed April 19, 1995.

An Appeal from the Circuit Court for Dade County, Scott J. Silverman, Judge.

Robert A. Butterworth, Attorney General, and Paul M. Gayle-Smith, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Amy D. Ronner, Special Assistant Public Defender, and Al A. DiCalvo and Jorge L. Pereira, Certified Legal Interns, for appellee.

Before NESBITT, BASKIN and GERSTEN, JJ.

BASKIN, Judge.

The state appeals an order dismissing the information against Defendant on double jeopardy grounds. We affirm.

Defendant was arrested on July 4, 1993, and issued the following tickets: two for DUI with serious injury, two for DUI with property damage and one for driving with a suspended license. Defendant pled not guilty; the matter was set for trial in county court. The court clerk then transferred the tickets to circuit court. Neither party requested a transfer, and the record does not reveal how the transfer was effected. On August 4, the state filed an information in circuit court charging defendant with felony DUI, two counts of DUI property damage and one count each of DUI personal damage, DUI impairment and driving with a suspended license; these charges arose from the same incident as the tickets. The cases were never consolidated.

The speedy trial period on the tickets ran on October 4. On October 15, defendant filed a Notice of Expiration of Speedy Trial in county court. The state took no action within the window period. Fla. R. Crim. P. 3.191(p)(3). Defendant filed a motion to discharge the tickets.

On November 18, Defendant filed a motion in circuit court to dismiss the information on double jeopardy grounds. On December 3, the state nolle prossed the tickets.[1] On December 17, the court granted defendant's motion and dismissed the information.

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[1] Contrary to the state's representation at oral argument, the state did not nolle prosse the tickets before the speedy trial period expired. (T - 3, 6).

As a matter of law, defendant is forever discharged from the county court charges. After the speedy trial period ran on the misdemeanor ticket offenses, defendant filed appropriate motions for discharge. The state's nolle prosequi was a nullity because the state took no action pursuant to Rule 3.191(p)(3) after the notice of expiration of speedy trial period was filed.[2] Rule 3.191(p)(3) provides that a defendant not brought to trial within 10 days of a hearing on a notice of expiration of speedy trial "shall be forever discharged from the crime."

Double jeopardy bars the state from prosecuting defendant for the offenses discharged in county court. The tickets charged defendant with misdemeanor DUI in violation of section 316.193, Florida Statutes (1991), and the information charged defendant with a felony DUI violation of section 316.193, Florida Statutes (1991). Because neither offense contains a statutory element that the other offense does not, they do not constitute separate offenses as defined in section 775.021(4)(b), Florida Statutes (1993), and the Blockburger[3] test is not met; both offenses are identical.

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[2] The state's argument that the charges were consolidated is without merit. Consolidation may be authorized by only the trial judge upon the proper motion of a party. Ashley v. State, 265 So. 2d 685 (Fla. 1972); Fla. R. Crim. P. 3.151. Neither the state nor the defendant filed a motion to consolidate. The court clerk's transfer of the case did not effect a consolidation, and the clerk had no authority to consolidate the cases.

[3] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

Section 316.193 defines only one type of DUI offense,[4] see Collins v. State, 578 So. 2d 30 (Fla. 4th DCA 1991), punished with increasing severity in successive violations. Jackson v. State, 634 So. 2d 1103, 1106 (Fla. 4th DCA 1994)(en banc)(statutory scheme requires increased punishment "based on the number of times the defendant drives under the influence"). The elements of proof of both felony and misdemeanor DUI offenses are identical.

Although proving the existence of three prior DUI conviction is an essential element of felony DUI offense, State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991), the sole distinguishing factor between the misdemeanor and the felony is the severity of punishment prescribed by section 316.193(2). See Rodriguez, 575 So. 2d at 1266 ("if a defendant charged with felony DUI elects to be tried by jury, the court shall conduct a jury trial on the elements of the single incident of DUI at issue . . . . If the jury returns a guilty verdict as to that single incident of DUI, the trial court shall conduct a separate proceeding without a

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[4] Section 316.193, Florida Statutes (1991) provides, in part:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:
> (a) The person is under the influence of alcoholic beverages . . . ; or
> (b) The person has a blood or breath alcohol level of 0.10 percent or higher.

jury to determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more prior occasions."). Hence, the offenses fall under the section 775.02(4)(b)1. double jeopardy bar for "Offenses which require identical elements of proof."

The state correctly asserts that, technically, jeopardy did not attach because no jury was sworn, and no evidence was taken on the discharged offense. "However, since the discharge under the [speedy trial] rule is for failure of state action to timely prosecute, such discharge by the clear language of the rule would rate as an estoppel against prosecution of defendant for the same offenses from which he has been previously discharged." Rawlins v. Kelley, 322 So. 2d 10, 13 (Fla. 1975).[5] Where, as here, the two offense are identical, trying defendant on the same charge discharged under the speedy trial rule would violate the express prohibition of the rule.

Dismissal affirmed.

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[5] We agree with defendant that the holding in Nesworthy v. State, 20 Fla. L. Weekly D88 (Fla. 5th DCA Dec. 30, 1994), is not binding on this issue, in view of the supreme court's subsequent pronouncement in Reed v. State, 20 Fla. L. Weekly S34 (Fla. Jan. 19, 1995).

EXHIBIT 2

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 94-309

STATE OF FLORIDA,

Appellant,

vs.

WILLIAM R. WOODRUFF,

Appellee.

_____/

MOTION FOR REHEARING
CERTIFICATION AND CLARIFICATION

Appellant, the State of Florida moves this court, pursuant to Florida Rule of Appellate Procedure 9.330(a), for a rehearing, certification and for clarification of its published opinion in the above styled cause and states, in support of this motion, the following:

1. The court has overlooked facts material to this cause and misapprehended the controlling law.

2. The court has misapprehended and misapplied the Florida Supreme Court's ruling in Reed v. State, 20 Fla.L. Weekly S34 (Fla. Jan. 19, 1995). In Reed, the state filed the felony information some 245 days after Reed's arrest. The court held that the speedy trial period began to run from the date of Reed's arrest and that the nol-prossing of the initial felony charges did not toll the speedy trial period.

Thus Reed is distinguishable from Nesworthy v. State, 648 So. 2d 259, 260 (Fla. 5th DCA 1994), upon which case Appellant's oral argument relied, and this case because in both of these latter mentioned cases the State filed the felony information well within the speedy trial period for felonies. In Reed the State filed, and then nol-prossed, a felony information prior to filing another felony information some 245 days after Reed's arrest, and well outside the speedy trial period for felonies.

Nowhere did the Supreme Court in Reed state that the act of nol-prossing the initial felony charges prevented the State from re-filing the same or other felony charges within the speedy trial period for such offenses. Indeed the court in Reed stated that the state could have filed a subsequent felony information within the speedy trial period:

> We recognize that under some circumstances there may be legitimate reasons why the State is not ready to file charges against a defendant who has previously been arrested. However, the State cannot simply wait and let the speedy trial time period run. The State's remedy would appear to be to file the charges before the expiration of the speedy trial time and seek an extension under the provisions of the speedy trial rule.

3. This court's decision is in direct and express conflict with the court's decision in Nesworthy v. State, 648 So. 2d 259, 260 (Fla. 5th DCA 1994), which case is factually indistiguishable from this one and where the court stated:

> It appears to us most logical, and most consistent with the scheme set forth in Rule 3.191, that nothwithstanding the speedy trial status of any previously filed misdemeanor, a felony may be charged and the defendant brought to trial within the speedy trial time frames applicable to felonies. (footnotes omitted).

4. This court's reliance on Rawlins v. Kelley, 322 So. 2d 10 (Fla. 1975) is entirely misplaced. In Rawlins the State obtained grand jury warrants 178 days after Rawlin arrest, after the court had dismissed, on speedy trial grounds several lesser charges arising from the same incident. Moreover, Rawlins has been completely ignored by the Florida Supreme Court in subsequent cases, including Reed.[1]

5. Appellant respectfully requests that this court certify the conflict between its ruling in this case and the Fifth Distict court's ruling in Nesworthy v. State, 648 So. 2d 259, 260 (Fla. 5th DCA 1994) based on the aforementioned express and direct conflict.

6. In addition the Appellant requests that the court certify the following question as one of great public importance:

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[1] Interestingly, though inconsistently, Rawlins also states that there was no violation of double jeopardy in that case.

MAY THE STATE FILE A FELONY INFORMATION AT ANY TIME DURING THE SPEEDY TRIAL PERIOD FOR FELONIES, DESPITE THE FACT THAT MISDEMEANOR CHARGES RELATING TO THE SAME CRIMINAL EPISODE WERE ALSO PENDING AT SOME TIME PRIOR TO THE FILING OF THE FELONY INFORMATION, REGARDLESS OF WHETHER SAID MISDEMEANOR CHARGES HAD BEEN NOL-PROSSED OR WERE STILL PENDING AT THE TIME THE FELONY INFORMATION IN QUESTION WAS FILED.

7. Furthermore, the court's published opinion, specifically footnotes one and two, misstates the positions consistently taken by the Appellant both in its written appellate pleadings and at oral argument. Counsel respectfully requests that the footnotes in question be deleted.[2]

Specifically, it appears that footnote one resulted from counsel's genuine misunderstanding of a question posed to said counsel by this honorable court at oral argument. Counsel should have said, in answer to the court's question whether the misdemeanors were nol-prossed within the speedy trial period, that the misdemeanor felonies were nol-prossed within the speedy trial period for the previously filed felony information. Instead, counsel believing that he understood the question, simply said "yes". It appears obvious now, after reading the court's opinion, that the court was referring to the misdemeanor speedy trial period.

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[2] Footnote two could simply be changed to reflect that the State's position on appeal was that consolidation had never occurred.

~~Footnote~~ ~~two~~ is misleading because it suggests that the State argued in its appellate brief and at oral argument that consolidation of the misdemeanor and felony cases had occurred. However, the State's position on appeal was just the contrary, as a cursory inspection of the State's initial brief on appeal reveals.[3]

CONCLUSION

For the above stated reasons this motion for rehearing, certification and clarification should be granted.

Respectfully submitted,

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[3] Indeed, the State argued on appeal that the Defendant had waived consolidation.

EXHIBIT 3

94-130227-01

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUART TERM, A.D. 1995

WEDNESDAY, MAY 31, 1995

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 94-309
WILLIAM R. WOODRUFF,	**	
Appellee.	**	

Upon consideration, appellant's motion for rehearing, certification and clarification is hereby denied. Nesbitt, Baskin and Gersten, JJ., concur.

DOCKETED
MAY 31 1995
J.P.V.
ATTORNEY GENERAL

RECEIVED
JUN 1 1995
ATTORNEY GENERAL
MIAMI OFFICE

A True Copy

ATTEST:

LOUIS SPATLONE
Clerk District Court of
Appeal of Florida, Third District

By _____
Deputy Clerk

cc: Paul of Gable-Smith
Amy D. Ronner

/NB