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IN THE SUPREME COURT OF FLORIDA

BOBBY LEE BROWN,

Petitioner,

VS. **CASE NUMBER 90,891**

STATE OF FLORIDA,

Respondent.

______________________/

Petitioner's Brief on the Merits
Discretionary Jurisdiction Invoked from a
Decision of the District Court of Appeal, First District

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STATEMENT OF CASE

On November 30, 1994, Mr. Brown was arrested for a series of crimes that occurred on September 7, 1994. (R-I 1) Initially, the State of Florida charged him with four counts: (1) attempted first degree murder while engaged in the felony of robbery with a firearm; (2) kidnapping to facilitate the felony of robbery with a firearm; (3) robbery with a firearm; and (4) aggravated assault on a law enforcement officer. (R-3-4) Four months later, the State amended Count 1 of the Information, changing it to attempted premeditated first degree murder. (R- 1) To these charges, Mr. Brown pled not guilty. (R- 112)

Mr. Brown filed a motion to dismiss the Amended Information, claiming the time had run under the speedy trial rule. (R- 113) In response, the trial court set the case for trial on June 19, 1995. (SR-1) This was twelve days after the motion to dismiss was filed. (R- 113) The State then requested a hearing to inquire from the defendant personally, to insure he understood the speedy trial request. The State alleged that the defense had done no discovery and that the State's transmission of information to the defendant was incomplete. (R-l 1.5) In addition, the State filed a motion for extension of time due to exceptional circumstances. (R- 117) The exceptional circumstance was that the prosecutor was ill and was required to remain at home for two weeks.[1] That

*References to the record will be (R-); jury trial transcript will be (TR-); Supplemental Record (SR-).

[1]This prosecutor was Elaine Ashley, not the prosecutor arguing the motion, Brad Thomas. (TR-202)

same date, a hearing was held on the State's motion. The trial court granted the State's motion and rescheduled the case for July 17th. (TR-2 10)

After a jury trial, Mr. Brown was found guilty of the lesser included offense of attempted second degree murder and guilty as charged on the remaining three counts. (R-126 Ct. 1; R-128 Ct. 2; R-129 Ct. 3; R-132 Ct. 4).

From these judgments of conviction and sentences, Mr. Brown filed a timely notice of appeal, (R-l 84). After written argument, the First District Court of Appeal by a 2-1 vote affirmed the decision of the trial judge extending the speedy trial time. The opinion certified that its decision was in conflict with decisions from the Third and Fourth District. Vallieres v. Grossman, 573 So. 2d 196 (Fla. 4th DCA 1991); Heller v. State, 601 So. 2d 642 (Fla. 3d DCA 1992).

In addition, the First District certified the following question to this Court as one of great public importance:

> IS AN EXCEPTIONAL CIRCUMSTANCE EXTENSION UNDER RULE 3.19 1(l)6 VALID, WHEN MADE AND OBTAINED DURING THE 5/1 O-DAY RECAPTURE WINDOW PROVIDED FOR IN RULE 3.191(p)(3), OR IS IT LIMITED ONLY TO AN EXTENSION MADE AND OBTAINED BEFORE EXPIRATION OF THE BASIC 175-DAY PERIOD PROVIDED IN RULE 3.19 1 (a)?

6Florida Rules of Criminal Procedure 1996.

From this decision, Mr. Brown filed a timely notice to invoke this Court's discretionary jurisdiction. This Court then issued an order postponing a decision on

jurisdiction and setting a briefing schedule. In accordance with that order, Mr. Brown files this brief on the merits.

STATEMENT OF THE FACTS

On June 7, 1995 Mr. Brown filed a motion to dismiss the amended information because of he State's failure to bring his case for trial **within** 175 days of his arrest, (R-113) June 7, 1995 was the 189th day after Mr. Brown's arrest on November 30, I 994. (R- 11) On June 13, 1995, the case was set for trial on June 19, 1995. On June 16, 1995, the trial judge held the initial hearing required by Rule 3.191 (p)(3), Fl. R. Cr. P.

The State had initially filed a motion to inquire from Mr. Brown whether he **concurred** in the speedy trial discharge motion. The State made a number of allegations in that motion but never pursued them, (R-114-116) Instead, the State filed a motion to extend the speedy trial time "pursuant to exceptional circumstances" stating that "the assigned prosecutor is not available due to medical condition requiring said prosecutor to remain home for two weeks due to physical illness." (R-117-118) It is undisputed that the extension motion was filed well beyond the end of the 175 days and after Mr. Brown had filed the requisite discharge motion.

Initially, the trial court set the trial for June 19, 1995 (jury selection) with the actual trial to begin the following day. At the hearing on the State's motion to extend the speedy trial time, the other prosecutor involved in the case told the judge that he could not be prepared to try the case consistent with the June 19, 1995 and June 20, 1995 schedule but could be prepared to try the case the following week. (R-202-203, 205-206) This prosecutor, Brad Thomas, was unequivocal in this representation to the

trial judge.

In response to the State's motion to extend the speedy trial time, the trial judge granted a "continuance".(R-209-2 10) In doing so, the judge relied on Rule 3.19 l(l) and found as follows:

(1) Mr. Brown was charged with three life felonies;

(2) The case was very important to the parties;

(3) Elaine Ashley had been involved in this case since the beginning and

(4) Ms. Ashley was medically incapable of trying the case the following Monday. (R-209-2 10)

The judge then reset the trial for a later period well beyond the recapture period.

SUMMARY OF THE ARGUMENT

Every district court that has considered the question posed by the First District has found that a trial judge has no authority to extend the speedy trial time for exceptional circumstances once the 175 day period has passed. These decisions reflect both a historical and legal purpose to impose a specific time limit for a defendant to be brought to trial. The majority's opinion eviscerates the intent of the rule to save the prosecution in this case, There is no question but that the State was dilatory in moving this case to a resolution. The majority opinion seeks to rescue the State from this failure. A fair reading of the rule supports the other district courts and Judge Webster's dissenting opinion.

THE TRIAL COURT SHOULD ANSWER THE CERTIFIED QUESTION "NO" - THAT IS, AN EXCEPTIONAL CIRCUMSTANCE EXTENSION IS NOT PERMITTED DURING THE RECAPTURE PERIOD

There is no question that the State was not diligent in the prosecution of this case. Mr. Brown was arrested on November 30, 1994 for crimes that occurred on September 7, 1994. Yet the State did not file a charging document until March 27, 1995 and an arraignment did not take place for another three weeks. When the June 7, 1995 motion for discharge was filed, the State had done nothing to further the prosecution.

Once the motion for discharge was filed the State had the "s/1 0 recapture window period" to try Mr. Brown. In reality, the five day period can be longer because weekends are not counted. Rule 3.040, Fl. R. Cr. P. Within these constraints, a timely five day hearing was held and the trial was set within the ten day period. (Rule 3.040, Fl. R. Cr. P. does not apply to this length of time because the prescribed period of time is not less than seven days). It was during this ten day time period that the State sought and got a reprieve.

There is one important fact, overlook by the majority opinion but determinative to the dissenting judge. At the hearing on the State's motion to extend the speedy trial time, the lawyer who was going to try the case in Ms. Ashley's stead told the trial judge that he stood in for Ms. Ashley "all the time" and that he would "'be prepared to try the case . . . within seven days." Therefore, the trial could have begun tried in a timely

fashion under Rule 3.19 1 (p) (3). The trial court chose to ignore this pronouncement and instead set the case for trial three weeks later. The record reflects that three weeks later Ms. Ashley did not try this case. The Court can decide this case solely on this issue, that is, there is a lack of an "exceptional circumstance" as defined by Rule 3.19 l(l).

In 1984, this Court approved an amendment to the speedy trial rule that eliminated the automatic discharge provision. In doing so, the Court adopted a process which gave the State a more flexible period of time to try the case. State v. Agee, 622 So. 2d 473 (Fla. 1993) This process works as follows:

(1) More than 175 days has passed since a defendant has been arrested for a felony and the case has not been tried;

(2) the defendant files a motion for discharge;

(3) the trial judge set a hearing on the motion within five business days and schedules a trial within the next ten days or

(4) the trial judge grants the motion for discharge unless one of the four exceptions set out in 3.19 1 (j) are found to exist.

In this case, the trial judge ultimately did not either set the trial within the scheduled period or grant the motion for discharge. This decision is in conflict with both the Fourth District - Vallieres v. Grossman, 573 So. 2d 196, 197 (Fla. 4th DCA 1991) and the Third District - Heller v. State, 601 So. 2d 642 (Fla. 3d DCA 1992). See also J.T. v. State, 601 So. 2d 283, 284 (Fla. 3rd DCA 1992); Tascarella v. Seav, 564 So. 2d

205 (Fla. 4th DCA 1990), rev. denied, 569 So. 2d 1280 (Fla. 1980) The the majority opinion says that "We are mindful of the cases from our sister courts which appear to announce a blanket rule regarding exceptional - circumstances extensions, although on facts different from those in the case, or with no discussion of the facts." In each case, the legal question was the same - "whether the court may extend the fifteen - day bringing [a case to trial] on a showing of good cause, after the speedy trial period has expired and a motion for discharge has been filed." J.T. v. State, 601 So. 2d 283 (Fla. 3d DCA 1992).

Every case addressing this issue has held no such extension is authorized. This is consistent with the established law before the 1984 amendment. In State ex rel. Smith v. Rudd, 347 So. 2d 813, 815 (Fla. 1st DCA 1977) (interpreting then Rule 3.191 (d)(3) (now Rule 3.19 1 (j)), the First District held that a trial judge "had no authority to extend the applicable time period due to exceptional circumstances after the 1 SO day speedy trial period had already run." This provision of the rule remains the same. The 1984 amendment was designed "to allow the State to remedy a clerical mistake by bringing the accused to trial; it was not intended to give the State an opportunity to revive its case after violating the rule. The Florida Bar Re: Amendment to Rules - Criminal Procedure, 462 So. 2d 386, 388 (Fla. 1984)." J. T. v. State, 601 So. 2d at 284.

This intent seems clear from the Committee Note appended to the 1984 amendment.

> The intent of (I) (4) [now (p) (3)] is to provide the state attorney with 15 days within which to bring a defendant to trial from the date of the filing of the motion for discharge . . .
>
> This section provides that, upon failure of the prosecution to meet the mandated time periods, the defendant shall file a motion for discharge, which will then be heard by the court within 5 days. The court sets trial of the defendant within 10 additional days. The total 15 day period was chosen carefully by the committee, the consensus being that the period was long enough that the system could, in fact, bring to trial a defendant not yet tried, but short enough that the pressure to try defendants within the prescribed time period would remain. In other words, it gives the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints. It was felt that a period of 10 days was too short, giving the system insufficient time in which to being a defendant to trial; the period of 30 days too long, removing incentive to maintain strict docket control in order to remain within the prescribed time periods.

462 So. 2d at 388.

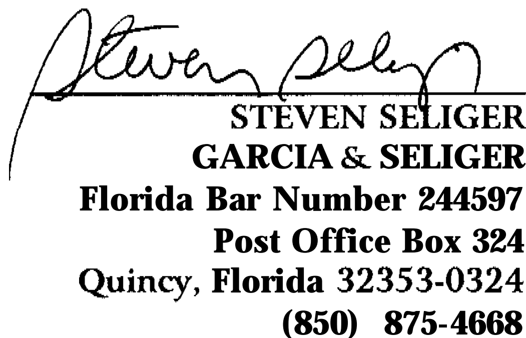
As Judge Webster points out in his dissent, ""It seems to me relatively clear that the 15 - day recapture window afforded by . . . Rule 3.191(p)(3) was intended to provide the State with a grace period of last resort to save its case from dismissal for failure to comply with the time periods mandated by the speedy trial rule."

The First District's majority opinion ignores this provision, instead deciding that the State can request an extension at any time, This reading renders the 15 day recapture time superfluous. It must be remembered that the recapture window is only

activated when a defendant files a motion for discharge. Up until that point, the State is free to seek an extension. If the State can also seek an extension after a legitimate motion for discharge has been filed, then there is no time limit. The majority opinion also ignores the purpose of the rule but instead focuses on the "draconian remedy . . . [perpetuating] the unintended strategy of dismissal and discharge." The State is at fault in this case, not Mr. Brown. For reasons known only to the prosecution, Mr. Brown was not charged by information until four months after his arrest and the arraignment set a month later. The initial case management was set for a week after the 175 days passed, At all time, Mr. Brown asserted his right to be tried in a timely fashion. The rule was not intended to reward dilatory prosecutions by giving the State an unlimited amount of time to get its case ready for trial. It was intended to set a standard for the resolution of a criminal matter. The State did not meet this standard in Mr. Brown's case.

CONCLUSION

For the reasons stated in his initial brief, Mr. Brown requests this Court to reverse the judgment of the district court and remand with instructions that his convictions and sentences be vacated and that he be discharged from any further criminal liability for this **case.**



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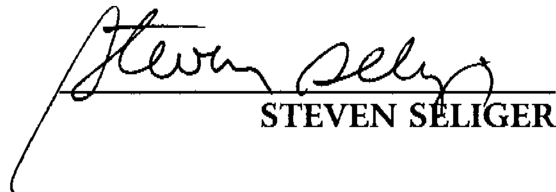
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this 22nd day of July, 1997 to **Ms. Carolyn J. Mosley,** Assistant Attorney General, The Capitol, Tallahassee, Florida 32399- 1050.



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