IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,097

DCA No. 97-588

THE STATE OF FLORIDA,

Petitioner,

vs.

Jorge Olivo,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

****

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

SYLVIE PEREZ-POSNER
Assistant Attorney General
Florida Bar No 794554
Republic Tower
Dept. Of Legal Affairs
110 S.E. 6th Street, 10th Fl.
Fort Lauderdale, FL 33301
(954) 712-4600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE **PAGE**

OTHER AUTHORITY

INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the appellant in the Third District Court of Appeal and the prosecution in the trial court. Respondent, JORGE OLIVO, was the appellee in the court of appeal and the defendant in the trial court. The parties will be referred to as they stood before the trial court, i.e., the Petitioner will be referred to as "the State," and the Respondent will be referred to as he stood in the trial court, or "the defendant."

The symbol "R" will be used to refer to the Record on Appeal. The symbol "T" will be used to refer to the transcript of the hearing. The symbol "SR" will be used to refer to the appendix filed with the State's motion to supplement the record on appeal, which consists of Exhibits A through G, as appended to the State's Initial Brief on direct appeal.

CERTIFICATE OF TYPE SIZE AND STYLE

Apellant certifies that the size and style of type used in this brief is 12 point Courier New.

STATEMENT OF THE CASE AND FACTS

The defendant was arrested on October 13,1995, for an incident where he struck a utility pole on August 24, 1995, at 3:00 a.m., severely injuring himself and his passenger. Both were airlifted to Jackson Memorial Hospital in critical condition (Ex. B). According to the arrest affidavit, on the day following the incident, or August 25, 1995, the police, with an arrest warrant, obtained urine and blood samples from the defendant. Subsequent analysis by the toxicology lab revealed that the defendant's blood alcohol level was .16%, and the samples were also positive for cocaine, cocaethylene, THC, nordiazepam, oxazepam and temazepam (Ex. B, page 2). The complaint/arrest affidavit reflected "DUI serious bodily injury," in violation of section 316.193(3)(c)(2), Florida Statutes (Ex. B, page 1).

The defendant was either 16 or 17 years old at the time of his arrest on October 13, 1995.[1] The intake unit assigned was the juvenile unit, on October 23, 1995 (Ex. A, electronic docket sheet, page 2). On November 15, 1995, the State announced its intent to review the case pursuant to section 39.0587(1)-(3), Florida Statutes and requested that the trial court set a hearing within 21 days (Ex. C). On November 29, 1995, the matter was heard, with the defendant, the State and the assistant public

[1] The arrest affidavit reflects a birthdate of 8-17-78 (Ex. B), and the information subsequently filed reflects a birthdate of 8-17-79 (R. 1-3).

defender present. The trial court entered a detention sounding order in which it is reflected that the public defender was appointed, and that no plea was required because it was the State's intention to review the case to determine whether it would be direct filed in the criminal division (Ex. D, page 1). The trial court found probable cause to believe that the act alleged had been committed. The court released the defendant to the custody of his parent, pending a hearing on December 20, 1995 (Ex. D, page 2). On December 20, 1995, the trial court, on the record, called the case and stated that the matter was about the direct file on Jorge Olivo and the State "resigning" custody. An assistant state attorney asked the trial court to re-set the matter in two weeks, which the court granted (Ex. E, page 2).

On December 11, 1995, the State had a subpoena *duces tecum* for deposition delivered to the custodian of medical records at Jackson Memorial Hospital, as well as subpoenas to Officers Patricia Sedano and Angela Kearney (Ex. F).

The State, on March 27, 1996, filed an "Announcement of Direct File," in which the prosecutor stated that an information had been filed charging the defendant as an adult with the offense of driving under the influence with serious bodily injury, in violation of section 316.193(3)(c)2, Florida Statutes (Ex. G). The case proceeded in the adult division of the circuit court during the course of the next several months. In the months of November

and December, 1996, it was set twice with respect to a plea (Ex. G, electronic docket sheet).

On February 10, 1997, or almost eleven months after the State filed the information, the defendant filed a motion to dismiss in the circuit court, criminal division, which was heard on the same day (S.R.; Ex. G, electronic docket sheet, page 1). At the hearing, the assistant state attorney acknowledged the case of *State v. Perez*, 400 So. 2d 91 (Fla. 3d DCA 1981), but cited other authority on the same issue holding contrarily to *Perez*. The State advised the trial court that it had filed an information before the felony trial period ran (S.R. 2-4). The trial court, at the conclusion of the hearing, dismissed the State's argument about other existing law and declared: "It appears clearly that at this time, in this district, *State v. Perez* is still the law." It then dismissed the State's case outright, under what the court stated was the speedy trial rule (S.R. 4). The trial court entered an order dismissing the case based upon the State's failure to bring the defendant to an adjudicatory hearing within ninety days, under the Rules of Juvenile Procedure (R. 6-7). The trial court subsequently entered a "Corrected Order to Dismiss," on March 12, 1997 (R. 15-16). This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred when it affirmed the trial court's order dismissing the case based upon the juvenile speedy trial rule, on the authority of *Perez v. State*, 400 So. 2d 91 (Fla. 3d DCA 1981), *pet. for rev. denied*, 412 So. 2d 470 (Fla. 1982). Its decision should be quashed.

The Third District Court of Appeal certified conflict with two district courts of appeal, i.e., *Bell v. State*, 479 So. 2d 308 (Fla. 2d DCA 1985), and Parr v. State, 415 So. 2d 1353 (Fla. 4th DCA 1982). Consistent with *Bell* and *Parr*, the Petitioner submits that the juvenile rules of procedure (specifically, the juvenile speedy trial rule) did not apply in the present case, because the State did not file a petition for delinquency at any time. Instead, the State exercised its prosecutorial authority to initiate the formal charges in the form of an information duly and timely filed in the adult division of the criminal court.

Even assuming *arguendo*, that the trial court could rely on the juvenile rules of procedure in an attempt to provide the defendant with a remedy for the State's failure to bring him to adjudicatory hearing within ninety days, the trial court still acted without authority in law when it dismissed the case outright, without giving the State ten (10) days in which to bring the defendant to trial. When the Third District decided *Perez v. State*, 400 So. 2d 91 (Fla. 3d DCA 1981), *pet. for rev. denied*, 412 So. 2d 470 (Fla.

1982),the recapture window did not exist.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT DISMISSED THE INFORMATION PURSUANT TO THE JUVENILE SPEEDY TRIAL RULE, SINCE THE STATE HAD NEVER FILED A PETITION IN JUVENILE COURT AND HAD INITIATED THE CASE AS A DIRECT FILE IN THE ADULT DIVISION OF THE CIRCUIT COURT WITHIN THE TIME ALLOWED UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.191(a).

The district court of appeal's decision to affirm the trial court's dismissal of the timely filed information against the defendant, should be quashed. The trial court's dismissal of the information constituted an abuse of discretion.

Section 39.0587(1)(e), "Transfer of a child for prosecution as an adult.-" provides, in pertinent part:

> 2. With respect to any child who was 16 or 17 years of age at the time of the alleged offense was committed, the state attorney:
>
> A. May file an information when in the state attorney's judgment and discretion the public interest requires that adult sanctions be considered or imposed.

Sec. 39.0587(1)(e)2.a., Fla. Stat. (Supp. 1994). Thus, "[t]he state attorney may, by filing an information, criminally prosecute a juvenile sixteen years or older when in his discretion the public interest requires that adult sanctions be imposed." *Washington v. State*, 642 So. 2d 61, 63 (Fla. 3d DCA 1994).[2] This is true

[2] Indeed, the present facts presented a compelling case for prosecuting the defendant as an adult. He was charged with "DUI serious bodily injury," in violation of section 316.193(3)(c)(2), Florida Statutes (Ex. B, page 1). The accident caused the

notwithstanding that a defendant is arrested as a juvenile and proceeds through the intake process under section 39.047.

Section 39.047, "Intake and case management.-," provides, in pertinent part:

> (4) The intake counselor or case manager shall make a preliminary determination as to whether the report, affidavit, or complaint is complete, consulting with the state attorney as may be necessary...
>
> (a) The intake counselor or case manager, upon determining that the report, affidavit, or complaint is complete, may, in the case of a child who is alleged to have committed a delinquent act or violation of law, recommend that the state attorney file a petition of delinquency or an information or seek an indictment by the grand jury. **However, such a recommendation is not a prerequisite for any action taken by the state attorney**.

Sec. 39.047(4)(a), Fla. Stat. (Supp. 1994)(emphasis added). Consistent therewith, subsection (e) adds:

> **The state attorney may in all cases take action independent of the action or lack of action of the intake counselor or case manager**, and shall determine the action which is in the best interest of the public and the child. If the child meets the criteria requiring prosecution as an adult, the state attorney shall request the court to transfer

---

defendant's passenger and the defendant to be airlifted to Jackson Memorial Hospital in critical condition (Ex. B). Analysis by the toxicology lab of a sample of the defendant's blood, obtained with a search warrant after the accident, revealed that the defendant's blood alcohol level was .16%, and the samples were also positive for cocaine, cocaethylene, THC, nordiazepam, oxazepam and temazepam (Ex. B, page 2).

> and certify the child for prosecution as an adult or shall provide written reasons for not making such request. In all other cases, the state attorney may ...
> ...
>
> 5. File an information pursuant to s. 39.0587.

Sec. 39.047(4)(e), Fla. Stat. (Supp. 1994)(emphasis added).

A defendant who has not reached the age of majority is not afforded access to the juvenile justice system as a matter of right. Rather, he is afforded such access only to the extent that the legislature provides. *See State v. Cain*, 381 So. 2d 1361 (Fla. 1980), cited in *Washington v. State*, 642 So. 2d 61 (Fla. 3d DCA 1994). The legislature is vested with absolute discretion to determine whether an individual charged with a particular crime is entitled to the juvenile justice system. *Id*. at 63.

The legislature, when it enacted section 39.04(3)(e)(4), Florida Statutes (1989), gave the state attorney the authority to file an information against the defendant, without first obtaining a transfer of jurisdiction from the juvenile court. *Washington*, 642 So. 2d at 63; *see also State v. Everett*, 624 So. 2d 853 (Fla. 3d DCA 1993). Thus, the state attorney's authority to file an information, rather than a petition for delinquency, and to thereby submit the defendant to the rules of criminal procedure, is not conditioned upon, or subject to, judicial discretion.

The law is settled that "[t]he decision whether to prosecute a person for a criminal offense or for a delinquent act and on what

evidence has traditionally been considered a purely executive function." *State v. E.T.*, 560 So. 2d 1282, 1284 (Fla. 3d DCA 1990); *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986); *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982). The Third District Court wrote, in *State v. Serra*, 529 So. 2d 1262 (Fla. 3d DCA 1988):

> The decision to file or not file criminal charges is a function of the State Attorney acting in his capacity as a member of the executive branch of the government. The decision is not given to the judiciary to dismiss criminal charges merely because a trial judge may disagree with the State Attorney's charging discretion in a particular case..."

Id. at 1263. The court in *Bloom*, noted that federal courts recognize the judiciary has curbed a prosecutor's discretion on whether or not to prosecute and how to prosecute, only in "instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights." *Bloom*, 497 So. 2d at 3, *quoting United States v. Smith*, 523 F.2d 771, 782 (5th Cir. 1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976).

The record in the instant case is devoid of any suggestion of impermissible motives on the prosecution's part. The defendant was released to a parent while the State reviewed the case to determine if it would file an information (Ex. D). The defendant was also aware at all times that the State was reviewing the case for direct

filing in the adult division of the circuit court (Ex. A, C).[3]

Nevertheless, the trial court dismissed the information, notwithstanding that the information complied with Florida Rule of Criminal Procedure 3.191(a). The trial court cited *State v. Perez*, 400 So. 2d 91 (Fla. 3d DCA 1981), *pet. for rev. denied*, 412 So. 2d 470 (Fla. 1982), to support its order. The Third District Court of Appeal *per curiam* affirmed the order based upon *Perez*. However, it certified conflict with *Bell v. State*, 479 So. 2d 308 (Fla. 2d DCA 1985), and *Parr v. State*, 415 So. 2d 1353 (Fla. 4th DCA 1982) *rev. denied*, *State v. Parr*, 424 So. 2d 763 (Fla. 1982). The State urges this Honorable Court to approve *Bell* and *Parr*, which are consistent with the rules of procedure and caselaw from this Court. Both *Bell* and *Parr* require that the opinion now on review be quashed.

The issue in *Bell*, was whether the time limitations of the juvenile rules of procedure applied to a juvenile's prosecution in the circuit court's adult division. The State had filed an information pursuant to its authority under [then] section

---

[3] Both the handwritten and electronic docket sheets, and particularly the more detailed electronic docket sheet from juvenile court, show that there were reports between the defendant's arrest on October 13, 1995 and January, 1996, related to the State's continuing review of the case for direct filing (Ex. A). In addition, there were subpoenas for deposition issued in December, 1995, in furtherance of the State's investigation of the case in order to make a proper determination of whether direct filing was appropriate (Ex. A, electronic docket sheet, pages 2-3; Ex. E).

39.04(3)(e)4, Florida Statutes (1983), rather than filing a petition for delinquency. The opinion is silent as to whether the juvenile was in detention or had been released, and as to whether the State had made known its intent to review the case for direct filing in the adult division, at any time between the arrest and the filing of the information.

In deciding the *Bell* case, the Second District initially noted that the defendant's position (that the time limitations of the juvenile rules should apply), found support in the Third District's *State v. Perez* decision written in 1981, but found more compelling the fact that the Fourth District had fashioned a contrary holding in *Parr v. State*, 415 So. 2d 1353 (Fla. 4th DCA), *pet. for rev. denied*, 424 So. 2d 763 (Fla. 1982), which this Court had subsequently cited and restated (and thus, arguably approved), in *D.C.W. v. State*, 445 So. 2d 333 (Fla. 1984), on its holding that the expiration of the 45-day "speedy file" period does not bar the State from charging the juvenile as an adult if such treatment is appropriate. Thus, the *Bell* Court followed *Parr*, based on the following analysis and reasoning:

> On the other hand, the court in *Parr v. State*, 415 So. 2d 1353 (Fla. 4th DCA), *petition for review denied*, 424 So. 2d 763 (Fla. 1982), held that the forty-five day period established by section 39.05(6) and **the ninety day juvenile speedy trial rule were inapplicable to a child against whom an information had been properly filed under section 39.04(2)(e)4.** *Accord State v.*

> *Puckett*, 384 So. 2d 660 (Fla. 2d DCA 1980)(section 39.05(6) applies only to the filing of a petition for delinquency).
>
> We opt to follow the rationale of *Parr*. **There is nothing in the statute or court rules that indicates the time limitations relating to juvenile proceedings were intended to apply to adult court proceedings initiated by information or indictment. The supreme court appears to have stated this proposition in *D.C.W. v. State*, 445 So. 2d 333 (Fla. 1984)**, when it noted that the expiration of the forty-five days prescribed by section 39.05(6) does not bar the state from charging the juvenile as an adult if the adult treatment is appropriate. Of course, the juvenile time periods will control if for some reason the case is later transferred back to the juvenile division.

Id. (Emphasis added.)

Notably, the Fourth District, in *Parr v. State*, 415 So. 2d 1353 (Fla. 4th DCA), *pet. for rev*. *denied*, 424 So. 2d 763 (Fla. 1982), held that the juvenile **"speedy file" and "speedy trial"** mandates were not applicable if a juvenile's case had been referred to the grand jury or the State Attorney filed an information against him, without ever having charged him as a juvenile. *Id*. at 1355. Based upon the facts before it, the *Parr* Court further held that in a situation where a juvenile's case is filed in adult court, the juvenile moves to transfer his case to juvenile court, and the trial court erroneously denies that motion (meaning that his case, as a matter of law, should have been in juvenile court), then State cannot file a petition for delinquency, if it would

then be time-barred under the juvenile rules of procedure. In *Parr*, the latter had occurred, so the cause was reversed.

In *D.C.W.*, this Court also cited *State v. Puckett*, 384 So. 2d 660 (Fla. 2d DCA 1980). In *Puckett*, the Second District noted that section 39.05(6), Florida Statutes (1979), provided that if a **petition** for delinquency was not filed within 45 days, it would be dismissed with prejudice. Further, the court wrote, "We believe that had the legislature intended that section 39.05(6) apply to the filing of an information, it would have so amended the subsection (6). Since Section 39.05(6) expressly states that it applies to a **petition**, it should not be read to apply to an information. *Id*. at 660-661 (emphasis added). *See also, State v. Wesley*, 522 So. 2d 1007 (Fla. 2d DCA 1988).

Florida Rule of Juvenile Procedure 8.090, "Speedy Trial," refers exclusively to the filing of a petition. It provides, in pertinent part:

> (a) Time. **If** a **petition** has been filed alleging a child to have committed a delinquent act, the child shall be brought to an adjudicatory hearing without demand within 90 days of the earlier of the following:
>
> (1) The date the child was taken into custody.
>
> (2) The date the petition was filed.

(Emphasis added.) Given its plain meaning, Rule 8.090(a) provides that it is only **if** the State files a **petition**, that the 90-day

period of time is implicated. There is no mention whatsoever of an information.

It follows, therefore, that since the State in the present case did not file a petition for delinquency, Rule 8.090 and the 90-day time limitation to bring the defendant to an adjudicatory hearing, was not triggered. The dismissal of the information was improper based upon the foregoing analysis and authority. Therefore, the district court of appeal erred when it affirmed the trial court's order of dismissal.

The trial court, in addition to discounting cases such as *D.C.W.*, *Parr*, *Bell* and *Purkett*, not to mention the express language of Rule 8.090 (which expressly applies to petitions for delinquency) and the aforecited statutes, also failed to comply with the Rules of Procedure. The trial court, and indeed the Third District, decided the present case as if the rules of procedure had not changed since *State v. Perez* was decided. Both were incorrect. Since *Perez* was decided, the window of recapture was added to both the Florida Rules of Criminal Procedure and the Florida Rules of Juvenile Procedure.

In Florida, "[t]he 'window of recapture' provision is commonly perceived as affording the state a fifteen-day grace period to escape an otherwise valid motion for discharge." *Baxter v. Downey*, 581 So. 2d 596, 599 (Fla. 2nd DCA 1991). The Third District Court of Appeal wrote an instructive opinion on this very issue,

in *Zabrani v. Cowart*, 502 So.2d 1257 (Fla. 3d DCA 1986). *Zabrani* was twice approved by this Court, first in *Bloom v. McKnight*, 502 So. 2d 422 (Fla. 1987), and then in *Zabrani v. Cowart*, 506 So. 2d 1035 (Fla. 1987).

In its *Zabrani* opinion, the Third District pointed out that the grace period which was added to the speedy trial rule, effective January 1, 1985, changed the analysis of the rule. The new analysis was that the "operative event" which triggers a defendant's right to discharge is no longer simply the running of a prescribed period of time, but rather, the filing by that defendant of a motion for discharge. Presumably, once that motion is filed subsequent to the expiration of the 175-day period, the defendant has the right to either be tried during the recapture period or discharged. *Zabrani.* The Zabrani opinion finds support in both the Rules of Criminal Procedure and the Juvenile Rules of Procedure.

Florida Rule of Juvenile Procedure 8.090(d), titled “Motion to Dismiss,” provides that “[i]f the adjudicatory hearing is not commenced within the periods of time established, the respondent shall be entitled to the appropriate remedy **as set forth in subdivision (m)**,” unless certain enumerated situations exist. (Emphasis added.) A reading of subdivision (m) provides in no uncertain terms that it is a **motion for discharge** that makes a discharge possible. Fla.R.Juv.P. 8.090(m)(2),(3). Thus, even

assuming *arguendo* that the defendant could rely on the juvenile rules of procedure, which the State posits he cannot, the defendant was not entitled to discharge, since he did not file such a motion.

Furthermore, the trial court did not even have the option of dismissal and/or discharge available without complying with Rule 8.090(m) or 3.191(p). The defendant at bar committed his offense in 1995 (Ex. B). Florida Rule of Juvenile Procedure 8.090(m), as it existed at that time, already provided that, "**No** remedy shall be granted to any respondent under this rule until the court **shall** have made the required inquiry under subdivision (d)." Its companion rule for "adult" court is Florida Rule of Criminal Procedure 3.191(p), which provides that, "**No** remedy shall be granted to any defendant under this rule until the court has made the required inquiry under subdivision (j)." Yet, the trial court granted the defendant the extraordinary remedy of dismissal without any such inquiry.

The remedy was particularly extreme and fundamentally flawed, since the language in both Florida Rule of Juvenile Procedure 8.090(m)(3) and Florida Rule of Criminal Procedure 3.191(p)(3), clearly provides that the defendant's **exclusive** remedy, if the State does not bring him to trial in accordance with the speedy trial rule, and upon his filing of a motion for discharge, is a hearing within five (5) days to determine if any of the reasons set

forth in the rule exist.[4] See Fla.R.Juv.P. 8.090(m); Fla.R.Crim.P. 3.191(p). Unless the trial court finds that one of the listed reasons exists, the court "shall order that the defendant be brought to trial within 10 days." Thus, **at the very most**, a trial court can order the State to bring the defendant to trial within ten (10) days. Fla.R.Juv.P. 8.090(m)(3); Fla.R.Crim.P. 3.191(p)(3).

The trial court below had no authority in fact or in law to dismiss the charges and discharge the defendant. *See R.J.A. v. Foster*, 603 So. 2d 1167 (Fla. 1992)(state's failure to bring a juvenile to adjudicatory hearing within ninety days does not create a per se entitlement to dismissal); *State v. S.W.*, 662 So. 2d 1020 (Fla. 5th DCA 1995)(court's reason for dismissal, i.e., that equity compelled dismissal due to defendant's extended stay in pretrial detention, was unsupported in law, where no Florida statute or rule of procedure extends the trial court the equitable power to order outright dismissal for failure to meet the ninety-day trial deadline). Thus, the trial court's order in this case was unsupportable in law and should have been reversed.

Accordingly, the State prays this Honorable Court will quash the district court's decision, approve *Bell*, and remand the cause

---

[4] Under the juvenile rules, Rule 8.090(m) provides the remedy of entitlement to a hearing and an inquiry under subdivision (d). In the Florida Rules of Criminal Procedure, it is Rule 3.191(p) that provides the remedy of entitlement to a hearing and the inquiry must be made weighing the factors in subdivision (j).

for further proceedings.

CONCLUSION

Based upon the foregoing reasons and authorities, the decision of the Third District Court of Appeal should be quashed and the cause remanded for reinstatement of the charges against the defendant in the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

SYLVIE PEREZ-POSNER
Assistant Attorney General
Florida Bar No. 0794554
Department of Legal Affairs
Republic Tower
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, FL 33301
(954) 712-4600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was furnished by mail to Craig Trocino, Esquire, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125, on this __ day of December, 1998.

_____
SYLVIE PEREZ-POSNER
Assistant Attorney General