IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,097

STATE OF FLORIDA,

Petitioner,

-vs-

JORGE OLIVO,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, Jorge Olivo, was the juvenile and defendant in the trial court and the appellee in the Third District Court of Appeal, and the Petitioner, the State, was the prosecution in the trial court and the appellant in the Third District. The parties will be referred to as they stood before the trial court or as they stand before this Court. The designation "R." will refer to the record, the designation "S.R." will refer to the supplemental record as forwarded by the lower court, and the designation "Pet. App." will refer to the Petitioner's supplemental appendix.

STATEMENT OF THE CASE AND FACTS

The Respondent regards the Petitioner's statement of the facts as containing some irrelevant facts and as omitting pertinent speedy trial facts. Accordingly, the Respondent has set forth its own.

The Respondent was arrested as a juvenile on Oct. 13, 1995 for the offense of DUI with serious injury (Pet. App. Ex. B.). The 90th day for trial (adjudicatory hearing) under Florida Rule of Juvenile Procedure 8.090 would have been January 11, 1996. On no less than eight occasions during and after the passage of this period, that is, on each of the dates of November 15, 1995, November 29, 1995, December 20, 1995, January 3, 1996, January 17, 1996, January 30, 1996, February 20, 1996, and March 12, 1996, the cause was reset for the state to determine whether it was going to direct file, that is, file the case as a felony (Pet. App. Ex. A., B., C., D., E.). While the Petitioner before this Court has suggested "investigation" as an implicit explanation of delay (Brief of Pet'r at 3, 11), that is inconsistent with its central reliance on detailed offense "facts" set forth in the original arrest form, and, of controlling importance, there is nothing in the record reflecting any showing before the trial court as to the reasons for delay in the determination to direct file. Nor was there ever, as there could have been, an extension of the speedy trial time or even a request made for such. At no pertinent time was there any defense delay, unavailability, continuance or waiver of either the juvenile or the adult speedy trial time

periods. Rather, the state simply used the entirety of the juvenile speedy trial time to even determine whether to direct file. Only on March 27, 1996, well after the passage of the juvenile speedy trial period, did the state first announce a direct file (Pet. App. Ex. A). The information was filed on March 19, 1996 (R. 1).

The 175th day for trial, that is, the 175th day from original arrest, under Florida Rule of Criminal Procedure 3.191 elapsed on April 5, 1996. The juvenile was not arrested on the felony information until April 9, 1996, after the passage of the speedy trial period (R. 4; Pet. App. Ex. G.).

The record presented before this Court is fairly described as skeletal; it reveals no explanation ever advanced by the state in the trial court for its extraordinary delay in proceeding with the case. On March 5, 1997, approximately a year and a half after original arrest, the trial court granted the respondent's motion to dismiss for failure to comply with the speedy trial requirements (R. 15). In argument on the motion to dismiss, the State essentially conceded that *State v. Perez*, 400 So. 2d 91 (Fla. 3d DCA 1981), was controlling and that it could find no sufficiently close adverse authority (S.R. 2-4). More fundamentally, as will be demonstrated in the argument portion of this brief, even completely independently of *State v. Perez*, that is, independently of any effect of Florida Rule of Juvenile Procedure 8.090, the trial court's order of discharge and the affirmance by the lower court were entirely correct under the bedrock case law underlying Florida

Rule of Criminal Procedure 3.191.

On appeal, the Third District Court of Appeal affirmed on authority of *State v. Perez*, and 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). *State v. Olivo*, 717 So. 2d 620 (Fla. 3d DCA 1998).

Upon the State's notice to invoke discretionary jurisdiction, this Court postponed decision on jurisdiction and directed briefing on the merits.

SUMMARY OF ARGUMENT

It has long been held, under all versions of the speedy trial rule, that the State may not, by its method of prosecution, unilaterally toll the time periods or engineer its own extension, and, concomitantly, that where the State chooses to change forum of prosecution or changes the method of prosecution, it bears a burden of compliance with all speedy trial requirements and bears the risk for failure of same. In this case, the State ultimately chose to file as a felony a case in which the Respondent had been arrested as a juvenile. However, it took the entirety of the underlying juvenile speedy trial period in which to do so, and, by not having filed a petition for delinquency within the 90 day period provided by Florida Rule of Juvenile Procedure 8.090, under controlling authority the State obviated any application of a 15-day window period thereunder. At no time, under any applicable time period of either speedy trial rule, i.e., rule 8.090, or if it were solely controlling, Florida Rule of Criminal Procedure 3.191, was there any extension, or continuance, waiver or unavailability of the Respondent.

When the State, after the passage of the juvenile speedy trial rule, first filed an information, that operated to end the juvenile charges and terminate jurisdiction over the juvenile. If, as the state contends, it is Florida Rule of Criminal Procedure 3.191 which solely applies, under Rules 3.130(a) and 3.131(j), the State was required either to obtain timely issuance of a promise to appear in the felony court or to timely obtain the re-arrest

of the juvenile before passage of the underlying speedy trial time period, that is, within 175 days. The juvenile was originally arrested on October 13, 1995, from which 175 days would have elapsed on April 5, 1996. The state did not obtain the re-arrest of the juvenile on the felony charge, however, until April 9, 1996, after the passage of the speedy trial time period. Therefore, even independently of the basis upon which the lower court resolved this case, discharge was appropriate and the result reached below should be affirmed.

Based on the foregoing, resolution of the conflict certified by the lower court is not necessitated. However, as the delay in the case demonstrates, if the issue is reached the rule which should be approved is that of *State v. Perez*, 400 So. 2d 91 (Fla. 3d DCA 1981). Where for more than a brief period or passing calendaring a case is in juvenile court before the State ultimately files felony charges, compliance with Florida Rule of Juvenile Procedure 8.090 should be required to assure prompt decision- making and timely progress of prosecution by the State.

ARGUMENT

WHERE, FOLLOWING AN ARREST OF THE RESPONDENT AS A JUVENILE, THE STATE TOOK FAR MORE THAN 90 DAYS TO DIRECT FILE THE CASE AS A FELONY, AND FOLLOWING THE DIRECT FILING DID NOT OBTAIN THE RE-ARREST OF THE RESPONDENT UNTIL AFTER THE PASSAGE OF THE 175-DAY PERIOD FOR TRIAL PROVIDED BY FLORIDA RULE OF CRIMINAL PROCEDURE 3.191, NO WINDOW PERIOD WAS APPLICABLE AND THE RESPONDENT WAS PROPERLY HELD ENTITLED TO DISCHARGE.

The speedy trial rule is an important implementation of a constitutional right, and is not, as is sometimes suggested, a gratuitous interposition by this Court. To the contrary, this Court enacted the original speedy trial rule only in response to legislative request and authorization, upon the legislative repeal of the statute intended to make way for the very rule. Rule 3.191 (and by necessary implication its progeny Rule 8.090 for delinquency cases) represents a substantial right and specific implementation, as authorized and directed by the Legislature, of a constitutionally sourced protection, and is

a successor to the provisions of a speedy trial statute repealed to make way for it. *See* ch. 71-1(B), § 7, Laws of Fla. (repealing the former speedy trial statutes); § 918.015(2), Fla. Stat. (1971) ("The Supreme Court shall, by rule of said court, provide procedures through which the right to a speedy trial as guaranteed by subsection (1) and by s. 16, Art. I of the State Constitution shall be realized.").

This Court has long recognized the important, substantive nature of the right protected by the speedy trial rule. *See State ex rel. Gutierrez v. Baker*, 276 So. 2d 470, 471 (Fla. 1973) ("[T]he accused has a vested interest in being brought to trial within the limitations set by Rule 3.191(.)"); *State ex rel. Butler v. Cullen*, 253 So. 2d 861, 863 (Fla. 1971) ("[T]he purpose of the Speedy Trial rule is to implement the practice and procedure by which a defendant may seek *and be guaranteed* his speedy trial." (emphasis added)). *See also State v. Williams*, 287 So. 2d 415, 419 (Fla. 2d DCA 1973) (Under rule 3.191, "a speedy trial is a substantive right to which one shall not lightly be deprived."); *State v. Williams*, 230 So. 2d 185, 187 (Fla. 4th DCA 1970) ("The [predecessor speedy trial] statute is mandatory and does confer upon the accused an absolute right to be set at liberty unless tried within the time prescribed, except under the circumstances specified.").

The state complied with neither the juvenile, Rule 8.090, nor the adult, Rule 3.191, speedy trial rule requirements herein. In a juvenile case, where the State does not

file a petition for delinquency within 90 days from the date of arrest, it does not get the benefit of the 15-day window period. *State v. T. W.*, 679 So. 2d 69 (Fla. 4th DCA 1996). Thus the State's reference in its brief to the juvenile not having filed a motion for discharge invoking the window period is of no avail to it. The State simply did not have the window period available to it, because of its failure to have either filed a petition for delinquency within the 90 days or, at minimum, to have obtained or even sought an extension of the speedy trial time.

Moreover, independent of any juvenile speedy trial rule requirements, assuming the case is taken as wholly governed by the adult speedy trial rule, Rule 3.191, the state did not comply with that rule either. The date of original arrest in this case was October 13, 1995 (Pet. App. Ex. B). The 175-day period for trial under Rule 3.191(a) elapsed on April 5, 1996. In ultimately and belatedly seeking to change jurisdiction of the case from a juvenile one to that of a felony, although the State filed its information on March 19, 1996 (R. 1), it did not have the juvenile arrested on the information until April 9, 1996 (R. 4; Pet. App G), which was *after* the passage of the 175-day period.[1] In this

[1] As an alternative to arrest, Rule 3.131(j) would have allowed jurisdiction over the child on the felony charge to have been established by a promise to appear in the felony court. The record does not reflect that this was done either. Further, in proceeding with re-arrest rather than promise to appear, the State also violated Rule 3.130(a) which required that, because the juvenile was in custody of juvenile authorities, a first appearance on the information be held within twenty-four hours of filing.

circumstance, again, it is clearly established that the State does not get the benefit of the 15-day window period. *Reed v. State*, 649 So. 2d 227 (Fla. 1995); *Genden v. Fuller*, 648 So. 2d 1183 (Fla. 1994); *State v. Agee* 622 So. 2d 473 (Fla. 1993). By its decision, untimely as it was, to file an information for a felony charge, the state effectively nol prossed the juvenile charges. When it did this, and again, assuming the sole applicability of rule 3.191 and no benefit to the juvenile from rule 8.090, the state was obligated to file or re-file charges *and obtain the re-arrest* of the individual within the *underlying* speedy trial time period, that is, within 175 days.

In *State v. Agee*, this Court rejected the proposition that the State could unilaterally exempt itself from the provisions of the rule by nol prossing a case or altering and reinstituting charges after the time period [in a felony case, the 175 days under subdivision (a) plus the fifteen-day window period provided under subdivision (p) of the rule] has run.

As *Agee* squarely held, subdivision (o) of the rule[2] "makes clear that the State

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[2] In *Agee*, the subdivision was referenced to by its former designation, (h)(2). Subdivision (o), substantively unchanged, provides: "**Nolle Prosequi; Effect**. The intent and effect of this rule shall not be avoided by the state by entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode or otherwise by prosecuting new and different charges based on the same conduct or criminal episode whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi."

cannot circumvent the intent of the rule by suspending or continuing the charge or by entering a nol pros and later refiling charges(.)" *Id*. at 475. "[W]hen the State enters a nol pros, the speedy trial period continues to run and the State may not refile charges based on the same conduct after the period has expired." (*Id*.).

The *Agee* core principle, that the State may not unilaterally exempt itself from the provisions of the speedy trial rule, by the manner or method by which it prosecutes, is supported by a long line of antecedent decisions, many of which long predate the nol pros entered in this case. *See, e.g., State ex rel. Green v. Patterson*, 279 So. 2d 362, 363-64 (Fla. 2d DCA 1973) ("Under the Speedy Trial Rule the time within which a person must be tried cannot be extended by the State entering a nolle prosequi to a crime charged and then prosecuting new or different charges based on the same conduct or criminal episode(.)"); *Richardson v. State*, 340 So. 2d 1998 (Fla. 4th DCA 1976) (same); *Fyman v. State*, 450 So. 2d 1250 (Fla. 2d DCA 1984) (same); *Thigpen v. State*, 350 So. 2d 1078 (Fla. 4th DCA 1977) (reversal of second-degree murder conviction; where defendant was arrested for murder, grand jury initially returned a "no true bill" and defendant was released, indictment was subsequently returned within the speedy trial period but defendant was not arrested on it until after the speedy trial period ran, defendant entitled to discharge), *cert. dismissed*, 354 So. 2d 986 (Fla. 1978); *State v. Thaddies*, 364 So. 2d 819, 820 (Fla. 4th DCA 1978) ("[A]lthough earlier charges arising from the same incident

are dropped, speedy trial time on charges later filed, but based on the same incident, is still measured from the date of arrest on the earlier charges."); *Robinson v. Lasher*, 368 So. 2d 83 (Fla. 4th DCA 1979) (state could not enlarge time for speedy trial by nolle prosse of charge and later, untimely filing of charges based on same incident); *Jay v. State*, 443 So. 2d 187 (Fla. 3d DCA 1983) ("[T]he State may not use its prosecuting procedure to unlawfully extend a speedy trial period."); *State v. McDonald*, 538 So. 2d 1352, 1353 (Fla. 2d DCA 1989) ("The State cannot avoid the intent and effect of [Fla.R.Crim.P. 3.191(h)(1)], and engineer its own extension of speedy trial time limits, by dropping one set of charges and later refiling different charges arising from the same criminal episode. . . . In the present case, revitalization of the misdemeanor resisting arrest charge is foreclosed notwithstanding the fact the state's election to file its so called "no bill" precluded the county court from entering a formal order of discharge.").

See also State ex rel. Bird v. Stedman, 223 So. 2d 85, 86 (Fla. 3d DCA 1969) (under statutory predecessor to speedy trial rule, the State could not avoid effect of speedy trial requirements by dismissing prosecution and then subsequently refiling; "A holding that the statute applies to the information filed and not the crime for which the accused is prosecuted would make possible the indefinite postponement of prosecution for a crime by the simple expedient of a continuous entry of nol prosequis and a continuous refiling of informations charging the same crime. This would violate the right

of one accused of a crime to a speedy trial(.)"). *P. S. v. State*, 658 So. 2d 92 (Fla. 1995).

The State's decision to direct file, that is, the act of direct filing which instituted a felony prosecution against the Respondent for the same conduct for which he was initially arrested, thus effectively terminated the juvenile proceeding against the Respondent. When the State discontinues prosecution, a defendant is released from the jurisdiction of, and any obligation to, the court, *Allied Fidelity Insurance Co. v. State*, 408 So. 2d 756 (Fla. 3d DCA 1982); *Datema v. Barad*, 372 So. 2d 193 (Fla. 3d DCA 1979). Thus the juvenile was legally released from obligation to appear before the juvenile court, and no obligation to appear, i.e., jurisdiction, had yet been established on the felony charge.

The relevant event, for purposes of assessing the timeliness under rule 3.191 of a state re-institution of prosecution, is not the mere filing or refiling of a charging document but the defendant's arrest thereupon. *Datema v. Barad, supra*; *State ex rel. Smith v. Nesbitt*, 355 So. 2d 202 (Fla. 3d DCA 1978) (where state changed between misdemeanor and felony prosecution of charges, it ran risk of, and was bound by, passage of speedy trial time periods where defendant not timely re-arrested); *Thigpen v. State*, 350 So. 2d 1078 (Fla. 4th DCA 1977) (where defendant was arrested for murder, and grand jury initially returned a "no true bill," speedy trial time continued to run and because defendant was not re-arrested upon indictment, which was subsequently returned *within* speedy trial period, until *after* the period ran, defendant entitled to discharge), *cert. dismissed*, 354 So. 2d

986 (Fla. 1978), *cited approvingly* by this Court in support of conclusion of entitlement to discharge in *Genden v. Fuller*, 648 So. 2d 1183, 1184 (Fla. 1994), which rejected the state's argument of applicability of the window period in such a circumstance. Thus, in this case, the State's re-institution of prosecution -- the re-arrest of the Respondent on April 9, 1996 -- occurred after the underlying 175-day speedy trial period ran, and no window period was applicable.

Further, the State has failed to recognize or acknowledge that the authority which it cites (Brief of Pet'r at 15-16) to this Court for the availability of a window period, *Zabrani v. Cowart*, 506 So. 2d 1035 (Fla. 1987), and *Bloom v. McKnight*, 502 So. 2d 422 (Fla. 1987), have been specifically overruled on the point by this Court in *State v. Agee*, *id*. at 476.

All of the foregoing demonstrates that, because in any event the Respondent was entitled to discharge independently by operation of rule 3.191, it is not necessary to and this Court may not find it appropriate to actually resolve the conflict certified. However, if it does so, the manifest unjustified delay and consumption of the entire juvenile speedy trial period by the State underscores the necessity of applying the constraints of rule 8.090 in such a circumstance. With the possible exception of where a case is only transitorily in the juvenile court, the purpose of application of rule 8.090 is to avoid extreme foot-dragging by the State in the decision whether to take the case to felony court, and to avoid

the possibility of manipulation and abuse. Although the latter, as distinct from plain and simple unjustified delay, did not necessarily occur in this case, it can easily occur and be used to thwart a juvenile's entitlement to discharge in a situation where the State never intended to direct file. That is, in a case in which direct filing was never contemplated by the State but it is faced with a lapse of the rule 8.090 time period, adoption of the approach sought by the Petitioner herein would functionally allow, indeed reward, the State for deciding to direct file to evade the impact of its own untimeliness. This is not on any basis a desirable policy result. Again, the Respondent does not assert such manipulativeness in this case, but rejection of the *Perez* rule would apply on a broad basis to permit or even invite it in other cases.

Finally, it should be noted that, while the State asserts that what is at issue is its own prerogative to decide whether to prosecute a matter as an act of delinquency or as a felony case, nothing that was decided below or that is argued herein impinges upon that prerogative, the existence of which is fully acknowledged and is not debatable in the slightest. To the contrary, all that is required is that the State exercise such prerogative in a reasonably timely manner, and, in particular, in compliance with speedy trial mandates. That did not occur herein. Further, while the Petitioner asserts that the record "is devoid of any suggestion of impermissible motives on the prosecution's part (,)" (Brief of Pet'r at 10), apart from the record being devoid of any suggestion of the reason for delay, which

lack favors the Respondent, not the Petitioner, the matter of good or bad motive is simply irrelevant to the analysis. *State v. Agee*, 588 So. 2d 600, 604 (Fla. 1st DCA 1991), *approved*, 622 So. 2d 473 (Fla. 1993). There is no good faith exception to the speedy trial rule, but there provision for extensions of it, Rule 3.191(i), (l); Rule 8.090(f). *Id.* None were obtained or sought here, and that is conclusive of the matter.

CONCLUSION

Based on the foregoing argument and authorities cited, the trial court properly granted discharge, and the district court properly affirmed, for failure of the State to comply with the requirements of Florida Rule Juvenile Procedure 8.090. Further, the rulings are independently sustainable under authority of Florida Rule of Criminal Procedure 3.191 and controlling case law thereunder. Accordingly, this court should elect to approve the rationale of, and in any event should approve the result reached by, both of the courts below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Sylvie Perez Posner, Assistant Attorney General, Office of the Attorney General, 110 Tower, 110 SE 6th Street, 10th Floor, Fort Lauderdale, Florida 33301, on March 5, 1999.

_____

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