IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC00-1905
Lower Tribunal No. 2D00-2978

LATUNDRA WILLIAMS,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent was arrested on October 8, 1999 for the offenses of child neglect and aggravated child abuse. Two hundred and six days after Respondent's arrest, the State filed a two count felony information on the charges of child neglect and child abuse. On June 26, 2000, Respondent filed a Motion to Discharge for Violation of Speedy Trial.

On July 10, 2000, the trial court conducted a hearing on Respondent's motion and ruled that her motion would be treated as a notice for expiration of speedy trial and set the case for trial within ten days. Reserving her right to challenge the denial of her motion, Respondent waived her right to speedy trial and filed a Writ of Prohibition with the Second District Court of Appeal.

On September 1, 2000, the Second District Court of Appeal, relying on Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994), granted Respondent's petition and certified the following question as being of great public importance:

> WHETHER THE HOLDING OF GENDEN V. FULLER, 648 SO. 2D 1183 (FLA. 1994), APPLIES WHERE THE STATE TAKES NO ACTION PRIOR TO THE EXPIRATION OF THE SPEEDY TRIAL PERIOD AND THEN FILES AN INFORMATION AFTER THE PERIOD HAS EXPIRED?

Williams v. State, 25 Fla. L. Weekly D2147, 2147 (Fla. 2d DCA Sept. 1, 2000). The State filed its Notice to Invoke the Discretionary Jurisdiction on or about September 7, 2000. On

September 21, 2000, this Court issued an Order Postponing Decision on Jurisdiction and Briefing Schedule.

SUMMARY OF ARGUMENT

The Second District Court of Appeal erred in applying the holding of Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994) to the instant facts. In Genden, this Court held that the speedy trial time begins to run when an accused is first taken into custody and continues to run when the State voluntarily terminates prosecution before formal charges are filed and the State may not file charges based on the same conduct after the speedy trial period has expired. Unlike the situation in Genden, the State in the instant case never terminated Respondent's prosecution by announcing either a "no action" or a *nolle prosequi*. Here, the State filed formal charges within the applicable statute of limitations, but after the speedy trial period expired. The trial judge applied the proper remedy in the instant case by treating Respondent's motion for discharge as a notice of expiration of speedy trial, thus enabling the State to utilize the recapture period provided for by Florida Rule of Criminal Procedure 3.191(p)(3).

ARGUMENT

THE HOLDING OF GENDEN V. FULLER, 648 SO. 2D 1183 (FLA. 1994) DOES NOT APPLY WHERE THE STATE TAKES NO ACTION PRIOR TO THE EXPIRATION OF THE SPEEDY TRIAL PERIOD AND THEN FILES AN INFORMATION AFTER THE PERIOD HAS EXPIRED.

In the instant case, Respondent was arrested by law enforcement officers on two felonies, but not formally charged by the State until 206 days after her arrest. Rather than file a notice of expiration of speedy trial under Florida Rule of Criminal Procedure 3.191(h), Respondent filed a motion to discharge for violation of speedy trial. The trial court found that Respondent's motion should be treated as a notice of expiration of speedy trial so that the State would have the benefit of the recapture period afforded by Rule 3.191(p)(3). The Second District Court of Appeal, relying on Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994), quashed the trial court's order and found that "[t]he speedy trial period began to run when Williams was taken into custody and expired before the State took action of any kind." Williams v. State, 25 Fla. L. Weekly D2147, 2147 (Fla. 2d DCA Sept. 1, 2000). The State submits that the Second District Court of Appeal erred in applying the holding of Genden and urges this Court to find that Genden is inapplicable to the instant case.

In Genden, after the defendant's arrest but before an information was filed, the State voluntarily announced that it

terminated the prosecution by announcing that it would bring "no action."[1] Genden, 648 So. 2d at 1183. Two hundred and seventeen days after the defendant's arrest, the State filed charges based on the same conduct. Id. Relying on earlier precedent, this Court in a 4-3 decision, found that rule 3.191 does not allow the State to effectively toll the running of the speedy trial period by entering a "no action" prior to the filing of formal charges. Id. at 1184 (analogizing the factual situation to that found in State v. Agee, 622 So. 2d 473 (Fla. 1993) wherein this Court held that when the State enters a *nolle prosequi*, the speedy trial period continues to run and the State may not refile charges based on the same conduct after the period has expired). The majority of this Court stated that rule 3.191 governing speedy trial commences when the accused is taken into custody as defined by 3.191(d), rather than when formal charges are filed against the accused by information or indictment. Genden, 648 So. 2d at 1184.

In his dissenting opinion, Justice Wells declined to apply the holding in Agee to a situation involving a "no action." Id. at 1185 (Wells, J., dissenting). Justice Wells stated:

> By the express language of Florida Rule of Criminal Procedure 3.191, the rule only applies to persons

[1]A "no action" is defined as "a dismissal of the pending charges before an information or indictment has been filed." Allied Fidelity Ins. Co. v. State, 408 So. 2d 756, 756 n.1 (Fla. 3d DCA 1982).

> charged with a crime by indictment of information. There is simply no basis in the plain language of the rule upon which to extend this rule of court procedure to instances in which a person has not been charged by indictment or information.

Id. at 1185-86; see also Fla. R. Crim. P. 3.191(a) ("Speedy Trial without Demand. Except as otherwise provided by this rule, . . ., every person charged with a crime by indictment or information shall be brought to trial . . . within 175 days if the crime charged is a felony."). Justice Wells further noted that the majority's interpretation of the rule of procedure places too great a burden upon the State.

> Arrest decisions are generally made by local law enforcement officials and are not necessarily made with the advice of counsel. Arrest decisions are different from decisions involving whether to charge a defendant with an information or an indictment. The information or indictment is the legal foundation upon which the State must proceed in the trial court. Thus, it is logical to apply this rule of court procedure only in instances where the state attorney has made the decision to proceed against a defendant in the trial court.

Genden, 648 So. 2d at 1186 (Wells, J., dissenting).

The Second District Court of Appeal in the instant case admitted that its reliance on Genden was "not without hesitation." Williams, 25 Fla. L. Weekly at 2147. The court noted Justice Wells' "persuasive" dissent and the pitfalls in the application of the Genden's majority view. Id. Nonetheless, the court relied on Genden and certified the following question as being of great public importance:

> WHETHER THE HOLDING OF GENDEN V. FULLER, 648 SO. 2D 1183 (FLA. 1994), APPLIES WHERE THE STATE TAKES NO ACTION PRIOR TO THE EXPIRATION OF THE SPEEDY TRIAL PERIOD AND THEN FILES AN INFORMATION AFTER THE PERIOD HAS EXPIRED?

Id. Acting Chief Judge Fulmer, concurring specially, indicated that she was "not totally convinced that Genden should be applied in a case where the State has taken no action to indicate an intention not to prosecute." Id. As Judge Fulmer properly noted, there is nothing in rule 3.191 that prevents a defendant who has been arrested and not formally charged from filing a notice of expiration of speedy trial directed to the case pending on the arrest. Id.

Petitioner submits that the proper remedy in the instant case was for Respondent to file a notice of expiration of speedy trial rather than a motion for discharge. Respondent never asked for a "speedy trial" by filing the requisite notice, but instead only sought a "speedy dismissal." See Clark v. State, 698 So. 2d 1274 (Fla. 3d DCA 1997) (stating that defendant who filed a "motion to discharge" after the 175-day speedy trial time had expired was not entitled to that relief; rather, he was entitled only to a trial within the fifteen-day recapture period, the right to which would have been triggered by a properly filed "notice of expiration of speedy trial"). The trial judge in the instant case treated Respondent's motion for discharge as a notice of expiration of speedy trial and set the case for trial

within ten days.

Petitioner urges this Court to find that the trial judge below applied the proper remedy in cases such as this where the State takes no action to terminate the charges prior to the expiration of speedy trial, but files an information after the period has expired. In this type of situation, a defendant should file a notice of expiration of speedy trial which triggers the recapture period of Rule 3.191(p). See, e.g., State v. Robinson, 744 So. 2d 1151 (Fla. 1st DCA 1999) (refusing to extend holding in Agee to a case where the State did not file a *nolle prosequi* and charges were continuously pending, but stated defendants should have filed a notice of expiration of speedy trial). Unlike the facts in Agee and Genden, the prosecution in the instant case was never terminated by an announcement of a *nolle prosequi* or "no action." Thus, the Second District Court of Appeal's reliance on these cases is inapplicable.

This Court should answer the certified question in the negative and reverse the Second District Court of Appeal's order granting Respondent's writ of prohibition. Respondent's case should be remanded to the trial court with directions to treat Respondent's motion for discharge as a notice of expiration of speedy trial. If this Court chooses to affirm the Second District Court of Appeal's opinion, the State respectfully requests that this Court consider an amendment to rule 3.191 to

reflect that the speedy trial rule applies to persons who have not been formally charged by an indictment or information. As Justice Wells stated in his dissenting opinion in Genden, "[i]f the speedy trial rule is going to apply to situations in which there is no information or indictment, then an amendment to the rule should be proposed. . . ." 648 So. 2d at 1186 (Wells, J., dissenting); see also Williams v. State, 25 Fla. L. Weekly D2147, 2148 (Fla. 2d DCA Sept. 1, 2000) (stating that "the rule as currently written does not contemplate the facts we address in Williams' petition, and to the extent that this court or the supreme court creates fact-based applications of the rule that do not apply to the rule as written, it underscores the need for amendment." (Fulmer, J., concurring).

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court answer the certified question in the negative and reverse the Second District Court of Appeal's order granting Respondent's petition for writ of prohibition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jeanine Cohen, Assistant Public Defender, Public Defender's Office, 800 East Twiggs Street, Tampa, Florida 33602, on this 13th day of October, 2000.

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COUNSEL FOR PETITIONER