IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,	:	
Appellant,	:	
vs.	:	Case No. 2D00-1374
DARREN GOODE,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Appellee, DARREN GOODE, accepts the Appellant's Statement of the Case and Facts with one exception. The Appellant claims the lower court expected the State to re-file the petition, but the record cite at T21-22 demonstrates that the lower court did not know what would happen next: "The Court: We'll take it one day at a time." (T22)

SUMMARY OF THE ARGUMENT

Because the State was required to bring Mr. Goode to trial within 30 days, the trial court was correct in dismissing the State's petition filed pursuant to the Jimmy Ryce Act when the State failed to bring Mr. Goode to trial within 30 days and failed to seek a continuance. Mr. Goode was not afforded even minimal due process, so the dismissal should be with prejudice.

As can be seen in this case and many other similar cases, the 30-day rule is being ignored and abused by the State. Forcing the State to deal with what this Court has determined is the mandatory 30-day provision in Section 394.916, Florida Statute (1999), requires more than just releasing those who have been confined for several weeks without counsel, a court date, or even notice of what the confinement is for. This section must also be found to be jurisdictional.

ARGUMENT

ISSUE

WHETHER THE LOWER COURT ERRED IN DISMISSING THE INVOLUNTARY CIVIL COMMITMENT PETITION BASED ON THE FAILURE TO CONDUCT THE TRIAL WITHIN THE STATUTORY 30-DAY PERIOD? (As restated by Appellee.)

The basic facts in this case are not in dispute: Mr. Goode was scheduled to be released on 10-28-99, and on that date the State filed a petition for civil commitment pursuant to the Jimmy Ryce Act (Act). Mr. Goode, however, was not served with the petition or appointed counsel until a hearing heard on 11-22-99 before a trial court judge not assigned to Mr. Goode's case. When respondent's counsel pointed out that there were only a few days left under the statutory requirement to conduct the trial within 30 days and asked to have the petition dismissed because it was "not even reasonable to think that we would be able to proceed to a trial in six days."; the trial court refused to address the matter because it was assigned to another judge. The trial court denied the motion without prejudice. (R61-67)

The next hearing is on Mr. Goode's motion to dismiss before the assigned trial judge on 1-24-00 asking that the petition be dismissed due to the State's failure to take the case to trial within 30 days or to properly obtain a continuance. At that hearing the State does not explain what happened between the two hearings; thus, there is no explanation for why nothing happened between 11-22-99 and 1-24-00. All the State could argue is that a

continuance had been granted on 11-22-99; but as the few pages dedicated to Mr. Goode's case clearly indicate, no such motion was made or granted. (R61-67, T1-23) Mr. Goode argued that the 30 days to go to trial under the Act was mandatory and jurisdictional. The trial court dismissed the petition and ordered Mr. Goode's immediate release. (R33,34; T1-23) The order does not say that the petition was dismissed with prejudice, and this issue was not really addressed by the lower court.

The State has appealed that order dismissing the petition, and the majority of its arguments center around whether or not the statutory 30-day period in which to go to trial under the Act is mandatory. This Court has recently answered that issue in Kinder v. State, 2D00-0764 (Fla. 2d DCA July 7, 2000). This Court held that the 30-day period is mandatory and found the State to have violated the requirements of the Act and Mr. Kinder's due process rights:

> Kinder concededly was not brought to trial within the thirty-day time limit, nor was a continuance sought or granted within that time frame. Moreover, Kinder was detained for forty-four days beyond the expiration of his prison sentence based upon an ex parte probable cause determination without being served with the commitment petition, brought to court, or offered counsel. As our sister court has observed, "the continued confinement of a person after he has served his full sentence for conviction of a crime is serious enough to warrant scrupulous compliance with the statute permitting such confinement, not to mention the applicable constitutional provisions." Johnson v. Department of Children & Family Servs., 747 So. 2d 402, 402 (Fla. 4th DCA 1999). In this case, the State neither complied with the requirements of the

> Act nor afforded Kinder even minimal due process.

Kinder, at p. 5. This Court ordered Mr. Kinder's immediate release, but it left to another day the question of whether the State could still continue to proceed under the Act since that issue was not properly before it. Kinder, at p. 6, ftnt. 2.

The next argument the State makes is that a continuance was effectively granted by the trial judge not assigned to the case when he refused to do anything with the case because he was not the assigned trial judge. The State also throws in the need for a continuance -- even though no one asked for one -- because respondent's counsel said he could not be ready in 6 days for a trial. Neither of these claims have merit.

The State kept Mr. Goode in prison after he completed his sentence on 10-28-99 by filing a petition on that date, but never served Mr. Goode with a copy of that petition. The State also did not provide Mr. Goode with an attorney until 11-22-99. In addition, the State never gave Mr. Goode an adversarial probable cause hearing. After waiting until 25 days after filing its petition, the State finally got around to having a hearing -- before a trial judge not assigned to the case, that was only for the limited purpose of serving a copy of the petition on Mr. Goode and getting an attorney appointed to Mr. Goode. The unassigned trial judge was not willing to go into substantive matters, and this should not have been a surprise to the State. The State waits until the 25th day to first bring Mr. Goode to court, serve him a copy of the petition, and get him an appointed attorney; and then

the State argues a continuance was necessary because respondent's counsel could not prepare for trial in just the few remaining days of the 30-day period. The State caused the delay and now wants to benefit from that delay. The trial court did not agree with the State's arguments, and this Court should also reject the State's arguments. What the State has done is create a "Hobson's" choice for the respondent -- the right to a speedy trial within 30 days from the date of the petition being filed under the Act versus the right to an effective attorney properly prepared for trial. By waiting until the 30-day time period has almost run to put the respondent on notice and give him counsel, the State forces the respondent to sacrifice one right for another, and this "Hobson's" choice has not been accepted by courts in similar situations. See ex rel. Wright v. Yawn, 320 So. 2d 880 (Fla. 1st DCA 1975) (State gave defendant his discovery with only 38 days left to run on speedy trial; in granting defendant a speedy trial discharge, the First District held that the State, through its own inaction, cannot force a defendant to choose between two co-equal right of speedy trial and discovery). The State had no right to force Mr. Goode to choose between his co-equal rights of competent and prepared counsel with discovery and a 30-day trial.

The State had the entire 30 days to prepare for a trial, but it only gave Mr. Goode and his newly appointed attorney a few days (approximately 6 days, including the 4 days of Thanksgiving weekend) to prepare for trial. The State never asked for a

continuance, but claims the respondent needed one in order to prepare. These tactics must be rejected.

The State's reliance on Meadows v. Kirscher, 24 Fla. Law Weekly D2576 (Fla. 4th DCA Nov. 17, 1999), rehearing den. Jan 12, 2000, is misplaced. In that case the State asked for a continuance within the 30-day period, the file had been administratively misrouted, and the trial judge needed additional time to set up procedures. In Mr. Goode's case, the State did not ask for a continuance, no one but the State was responsible for the delay, and no one claimed time was needed to figure out procedures and jury instructions. It is interesting to note that in ftnt. 5 the court in Meadows was concerned with the late appointment of counsel. The respondent was held for nearly 3 weeks before he was appointed counsel, and the court held that a respondent should be advised of the right to appointed counsel when served with the order or warrant for custodial detention. Merely advising the respondent of a right to appointed counsel is meaningless, however, if counsel is still not appointed for several weeks.

As was pointed out in the ftnt. in Meadow, in Kinder, and in this case, the State has made a practice of not getting appointed counsel to respondents under the Act for several weeks. It is this practice that makes the concept of a 30-day trial meaningless, because the State is counting on respondent's attorney being unable to prepare in only a few days. In the Kinder case, appointment of counsel did not happen until day 44. It is the State's job to proceed with the trial within 30 days, not the respondent's.

Waiting to serve the respondent with the petition and get the respondent appointed counsel until the 30 days has almost expires does not constitute good grounds for a continuance. Similarly, having a hearing before a judge not assigned to the case also does not constitute good grounds for a continuance. In Mr. Goode's case, as in Kinder, "the State neither complied with the requirements of the Act nor afforded [the respondent] even minimal due process." Kinder, at pg. 5. In Mr. Goode's case, the State did not even attempt to comply with the 30-day rule, and the State has no explanation as to what it did after the 11-22-99 hearing -- after it was put on notice of speedy trial problems -- up until the 1-24-00 hearing. This denial of even minimal due process requires a remedy.

The remedy awarded in Kinder was the release of the respondent, but this Court did not address whether the State could still proceed under the Act once the respondent was released. That particular issue was not present in Kinder, but it is present in this case. The trial court dismissed the petition and ordered Mr. Goode's release. It is Mr. Goode's contention that the 30-day requirement for trial is both mandatory and jurisdictional.

In the case of In re Brown, 978 P. 2d 300 (Kan. Ct. App. 1999), Mr. Brown was subjected to involuntary civil commitment under the Kansas Sexual Predator Act, K.S.A. 59-29a01 et seq. The Kansas statute, after which Florida's was patterned, provided for a 60-day time limit for trial. Meadows. The language in the Kansas statute is almost identical to Florida's. Id. Both mandate

that the trial **"shall"** be held within a particular time period. Id. The Kansas appellate court in Brown determined that the time requirement was mandatory and not merely directory; but in addition, the court determined that the time requirement was also jurisdictional. The court ordered the case dismissed because Mr. Brown did not receive a trial within the statutory time limit. Brown, 978 P. 2d at 303.

Even Florida's legislature has implied that the trial time limit is mandatory and jurisdictional. The Florida Legislature amended the Act May 26, 1999, removing it from chapter 916 and recreating it within chapter 394. The Legislature had the opportunity to provide that the 30-day time period for trial was not mandatory and was not jurisdictional, but opted not to do so. Yet, in other parts of the amended statute, the Legislature specifically provided that other time periods were not jurisdictional. For example, section 394.913(e), Florida Statutes (1999), governing time periods for agencies giving notice and completing assessments, provides that those time limits are not jurisdictional and does not prohibit proceeding against a person otherwise subject to these provisions. Section 394.9135(4), Florida Statutes (1999), setting forth time limits for evaluating those released earlier than anticipated, also provides that those provisions are not jurisdictional. One must therefore conclude that the Legislature intended that the time limit for trial be mandatory and jurisdictional.

In the Interest of M.D., 598 N.W. 2d 799 (N.D. 1999), upon which the State relies, did address whether the failure to bring the respondent to trial within 30 days, as required by the North Dakota statute, warranted dismissal. This Court should not, however, be persuaded by the finding in M.D., which found the failure to comply with the statute did not warrant dismissal. The underlying law upon which that court relied is completely distinguishable from Florida's Act. Under North Dakota's Act, the Office of the State Attorney files a petition alleging that the respondent is a sexually dangerous individual and may have the petition heard ex parte. N.D. Stat. Sec. 25-03.3-03 and 25-03.3-08 (1999). If the court finds there is cause to believe the respondent meets the criteria, the court issues an order for detention. Id. Once the court issues an order for detention, written notice must be given to the respondent, including the right to a preliminary hearing; the right to counsel, with counsel being appointed if the respondent is indigent; and the right to have an expert appointed. N.D. Stat. Sec 25-03.3-10. Such notice must include the date, time, and place for the preliminary hearing and include a copy of the petition that has been filed. Id. The respondent is entitled to a preliminary hearing within 72 hours of being taken into custody pursuant to the court's order, unless the respondent waives this hearing. N.D. Stat. Sec. 25-03.3-11. At the preliminary hearing, the respondent has the right to be present, to have counsel, to testify, and to present and cross-examine witnesses. Id.

Here, Mr. Goode, on the day he was scheduled to be released from prison, was taken and held in a secure facility for 25 days without notice, the appointment of counsel, or the opportunity to be heard. The only provision of the Florida Act that offers any protection of a respondent's due process rights is Section 394.916, Florida Statutes (1999). Contrary to the State's position that this is discretionary and not jurisdictional, it was clearly intended to be, and must be, mandatory and jurisdictional.

The case of People v. Curtis, 223 Ca. Rptr. 397 (Cal. App. 1986), upon which the State further relies, is also not dispositive. The court in that case relied upon California statutes which are not only substantially different from Florida's Act, but which have since been repealed. Cal. Welf. & Inst. Code sec. 6316.2 (1999). The most substantial difference, even in the repealed statute, were the procedural safeguards that were in effect at the time of Curtis to ensure the respondent due process of law. First, the respondent had already been committed to a state hospital for a specific term of years and the State was merely seeking to have the respondent committed for an additional specific term of years. Curtis, 223 Ca. Rptr. at 398. Second, the respondent received notice, was appointed an attorney, and appeared before the court prior the expiration of his commitment. Id. Third, the statute in question only required the respondent be brought to trial no later than 30 days prior to his release date. Id. at 398. The respondent, or counsel representing respondent, had appeared before the court on three separate occasions before

the 30th day prior to the respondent's release date; and the trial actually commenced on the 28th day prior to his release date. It was on this basis that a motion to dismiss was denied. Id.

While the appellate court did find that the trial being required to begin 30 days prior to the respondent's release date was directory and not mandatory, this should have no bearing on this Court's decision. The law and facts of this case are entirely different from Curtis, and Florida has no other procedural safeguards to ensure due process other than the requirement that a trial begin within 30 days of the finding of probable cause. §394.16, Fla. Stat. (1999).

Under the current California Act, a petition is filed while the respondent is still incarcerated under a sentence of a specific term of years. Cal. Welf. & Inst. Code Sec. 6601. When the state presents the petition to the court to determine if probable cause exists, the respondent is noticed of the hearing, has the right to be present, and is to be represented by counsel. Cal. Welf. & Inst. Code Sec. 6602. If the respondent's scheduled release date will expire before the probable cause hearing, the agency bringing the petition may seek judicial review. At the review the court will determine whether the facts presented, if true, constitute probable cause to detain; and then the respondent may be held beyond his release date. This probable cause hearing under the Act, shall be held within 20 days of the order issued by the court. (emphasis added). Cal. Welf. & Inst. Code sec. 6601.5

The current California Act is distinguishable from Florida's Act in that the respondent's due process rights are preserved by the requirements of being noticed of the probable cause hearing, having the right to be present, and to have counsel. This is clearly not the status of the law in Florida, where a respondent has absolutely no right in regard to the ex parte probable cause hearing. The only safeguard of the respondent's due process rights in Florida is that the trial must occur within 30 days of the order taking the respondent into custody.

In the case at bar, Mr. Goode was held 15 days after he was supposed to be released from incarceration based upon a petition and order which was entered against him ex parte and without his having any right at all in regards to his being heard at this hearing. Mr. Goode was not even served a copy of the petition or order or given counsel until the 25th day.

As for Amador v. State, 25 Fla. Law Weekly D259 (Fla. 4th DCA Jan. 26, 2000), the State reads too much into that opinion. Mr. Amador filed a petition for writ of habeas corpus in the Fourth District only because he was confined within the Fourth District's jurisdiction. Mr. Amador's Act proceeding, however, was being conducted within the Second District's jurisdiction. Mr. Amador claimed a speedy trial violation had occurred when trial was not commenced within 30 days, and the Fourth District determined that it was not authorized to exercise habeas corpus review in this situation. It then transferred the case to the Second District. If the Fourth District had decided the 30-day period is not

jurisdictional -- as the State claims (Appellant's Initial Brief p. 20), then there would be no need to transfer the case. The Fourth District simply did not rule on the issue at all. Such an issue was more probably the subject of a writ of prohibition, which should have been initially filed with the Second District. Amador does not, effectively or implicitly or otherwise, speak to the issue of the 30-day trial statute being jurisdictional.

As can be seen in this case and many other similar cases, the 30-day rule is being ignored and abused by the State. Forcing the State to deal with what this Court has determined is the mandatory 30-day provision in Section 394.916, Florida Statute (1999), requires more than just releasing those who have been confined for several weeks without counsel, a court date, or even notice of what the confinement is for. This section must also be found to be jurisdictional.

CONCLUSION

The trial court's order releasing Mr. Goode and dismissing the petition should be affirmed with prejudice.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dyann W. Beaty, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this ____ day of October, 2002.

Respectfully submitted,

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