IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

STATE OF FLORIDA,

Appellant,

v. **Case No. 2D00-1374**
L.T. No. 99-8722

DARREN GOODE,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE AND FACTS

The Appellant relies on the statement of the case and facts as submitted in the Initial Brief.

SUMMARY OF THE ARGUMENT

The lower court erred is dismissing the petition for civil commitment pursuant to Florida's involuntary commitment of sexually violent predators act. This Court's recent decision in the case of *Kinder v. State*, 25 Fla. L. Weekly D1637 (Fla. 2d DCA July 7, 2000) requires that the petition be reinstated. This court has determined that the 30-day trial provision found in the statute is not jurisdictional and in the *Kinder* case this court specifically refused to dismiss the petition. Instead, this court fashioned a remedy which it considered to be the only remedy adequate to address the violation of what was termed a "statutory right."

Furthermore, good cause for a continuance was shown at the hearing in the lower court. Although the exact words were not spoken by any of the participants, the continuance was considered and essentially ordered by the lower court when the judge specifically instructed counsel for Mr. Goode to take his motion to dismiss to the judge assigned to the case.

The inclusion of the 30-day trial provision in Section 394.916(1) Fla. Stat. (1999) creates a conflict with the applicable section of the Florida Rules of Civil Procedure 1.440. Because the time for bringing an action in this case is procedural, the rules of procedure should apply.

ARGUMENT

THE LOWER COURT ERRED IN DISMISSING THE INVOLUNTARY CIVIL COMMITMENT PETITION, AS THE FAILURE TO CONDUCT THE TRIAL WITHIN THE STATUTORY 30-DAY PERIOD IS NOT JURISDICTIONAL, AND THAT FAILURE DOES NOT DIVEST THE TRIAL COURT OF JURISDICTION TO PROCEED.

This court recently held that the 30-day trial rule found in Section 394.916(1)Fla. Stat.(1999) should not be construed as jurisdictional, and consequently, this court refused to quash the lower court order which denied a motion to dismiss a pending petition for failure to bring the matter to trial within the 30-day window. *Kinder v. State*, 25 Fla. L. Weekly D1637 (Fla. 2d DCA July 7, 2000).[1] The *Kinder* case came before this court as a petition for writ of prohibition, seeking to quash the lower court's order denying Kinder's motion to dismiss. However, this court determined that the petition was properly treated as one for mandamus, and denied Kinder's request for a dismissal of the action. In *Kinder* this court stated:

> Kinder argues that the thirty-day time limit should be construed as jurisdictional, the expiration of which divests the trial court of authority to proceed. We disagree. However, because, in this case, we have construed the time limit to be a statutory right, the only remedy that will adequately redress this

[1]The state has filed a motion for rehearing in the *Kinder* case and the motion is still pending at this time. The implementation of the release ordered in the *Kinder* opinion has been stayed pending rehearing.

> violation is the release of the detainee. (Footnote omitted.) We, therefore, grant Kinder's petition to the extent that it seeks his release from confinement and direct the trial court to order Kinder's immediate release. *Id*. at D1638.

This court opined that the only limit placed on the detention provision of the statute, Section 394.915(5)Fla. Stat.(1999), is the provision which mandates that a trial be held within 30 days of a finding of probable cause. Furthermore, this court has determined that the only adequate remedy available to redress a violation is the release of the individual. *Kinder* at D1637. This court specifically rejected Kinder's argument that the failure to comply with the 30-day time limits divested the lower court of the jurisdiction to proceed. However, this court did not reach the issue of the state's ability to proceed with the commitment proceeding based on the originally filed petition.

In *Kinder* this court determined that the statutory provision at issue was mandatory, but rejected the argument that the provision is jurisdictional and specifically this court did not dismiss the underlying petition for commitment. In the case at issue here, the lower court did dismiss the pending commitment petition in the erroneous belief that the failure to adhere to the 30-day trial provision required that remedy. However, the *Kinder* decision is dispositive on this issue.

The appellee here argues that no continuance was requested or granted at the lower court level, thereby causing the state to

violate the 30-day requirement found in Section 394.916(1) Fla. Stat. (1999). This is not the case. At the hearing, held within the 30-day time period, counsel for Mr. Goode made a premature motion to dismiss (R.66-67). The lower court denied the motion without prejudice, and specifically suggested that the matter should be brought before the judge assigned to the case (R.66-67). Counsel for Mr. Goode indicated to the court that he intended to file a written motion to dismiss (R.67).

Under the rules of Civil Procedure, Rule 1.440 an action is "at issue" and ripe for trial after any motions directed at the last pleadings have been dealt with. In this case, the motion pending was a motion to dismiss raised orally by counsel for Mr. Goode at the hearing on November 22, 1999 and then reiterated in a written motion not filed until January 6, 2000 (R.9-32). That motion had to be dispensed with prior to trial on the substantive issues. The lower court had good cause to set the matter off until such time as the correct judge could rule on Mr. Goode's dispositive motion.

The Wisconsin Court of Appeals recently addressed the issue of a statutorily required 45-day period for the commencement of trial in the case of *In re the Commitment of Matthew A.B.*, 231 Wis.2d 688, 605 N.W.2d 598 (Wis. App. 1999). It was undisputed that the probable cause hearing in the *Matthew* case was held on November 26, 1996 and the commitment trial was not commenced until September 15,

1997. *Id.* at 702, 605. However, the appellate court found no error in this failure to comply with the statutory 45 day trial rule because "[t]he record clearly reflects that each of the delays can be easily construed as a continuance sought by the court, by motion of the parties, or by stipulation of the parties." *Id.* at 703, 605.

North Dakota recently held that even if there was a failure to seek a continuance for good cause during the initial 30-days after a finding of probable cause, the State is not barred from presenting the good-faith argument after the expiration of the original trial period. *In the Interest of M.D., Brian D. Grosinger, v. M.D.*, 598 N.W. 2d 799 (N.D. 1999). In that case, the North Dakota Supreme Court wrote, ". . .we conclude the petitioner's failure to move for an extension until after the original 30-day period had expired did not deprive the court of authority to consider whether there was good cause to extend the time for the hearing." *Id.* at 803.

The reasoning of *Matthew* and *Grosinger* can be applied to the present case. Here, counsel for Mr. Goode made an oral motion to dismiss six days prior to the expiration of the 30-day trial rule. The lower court judge indicated that the appropriate place for that motion to be heard was before the judge assigned to the case. Counsel for Mr. Goode told the court that he intended to file a written motion to dismiss. That written motion was filed January

6, 2000. Consequently, the matter was effectively continued based on the pending motion made by Goode. This tolled the time for trial for at least as long as required to finalize the determination of that motion.

The appellee argues that he was kept "in prison" after he completed his sentence (Appellee's answer brief, p.5). This is a misstatement of the facts. The Florida Legislature intended that the Involuntary Civil Commitment of Sexually Violent Predators act, Sections 394.910-394.931 Fla. Stat. (1999), be a civil commitment statute. The civil nature of the statute is further exemplified by the legislature's determination that the rules of Civil Procedure apply to any actions taken pursuant to this statute. Section 394.9155(1) Fla. Stat. (1999).

The confinement of a person under this statute is not criminal imprisonment. This is true whether the confinement occurs based on an initial finding of probable cause to believe that the person is a sexually violent predator, or on a determination made by clear and convincing evidence presented at a commitment trial. In all cases, confinement under this statue is a form of civil commitment for the long term care and treatment of sexually violent predators. Section 394.910 Fla. Stat. (1999).

The appellee also argues that the State forced him to choose between the "right to a speedy trial" and the right to an "effective attorney properly prepared for trial" (Answer Brief,

p.6). Here again, the appellee confuses the civil nature of this action, with a criminal prosecution. The 30-day provision for trial included in Section 394.916(1) Fla. Stat. (1999) does not confer the "right to a speedy trial" on the respondent. The right the appellee refers to is applicable only to criminal defendants, not to a person being detained under the terms of the civil commitment act at issue here. Fla. Const. Art I, Section 7.[2] Florida statutes reiterate the right granted by the constitution, and here again, the right to a speedy trial is conferred only on a criminal defendant. Section 918.015 Fla. Stat. 1999. Finally, the rules of Criminal Procedure set out the procedure which must be followed to insure the criminal defendant's right to a speedy trial. Fla. R. Crim. P. 3.191 (2000). There is no corresponding right to be found in the rules of civil procedure.

Florida's Involuntary Civil Commitment of Sexually Violent Predators act is civil, and as such the criminal right to a speedy trial is not applicable. Neither do the rules of Criminal Procedure apply here. The appellee's reference to the "right to a speedy trial" is misplaced. However, it should be noted, that even in a criminal case where the speedy trial rule does apply, the remedy for a violation of its time periods is not a "speedy dismissal," but rather a "speedy trial." *See Dabkowski v. State,*

[2]*See also Valdez v. Moore*, 745 So. 2d 1009, 1011 (Fla. 4th DCA 1999)(sexually violent predators not entitled to release under Article I, section 14 of the Florida Constitution, or under section 907.041 Fla. Stat. because they are not charged with a "crime".)

711 So. 2d 1219 (Fla. 5th DCA 1998). Even the right to a speedy trial in a juvenile delinquency case has been held not to be a "per se right." In the case of *R.J.A. v. Foster*, 603 So. 2d 1167, 1172 (Fla. 1992), the Court expressly rejected the claim that a statutory provision regarding the time in which such cases must be tried was a "substantive right." *Id.* at 1171-72. Thus, the Court continued: "[w]hen a lawsuit must be filed is, in our view, substantive, how it is to be tried in an orderly manner is procedural." (Citations omitted.) *Id.* at 1171-72.

The rules of civil procedure are applicable to petitions for commitment filed under the Jimmy Ryce act. Section 394.9155(1) Fla. Stat. (1999). As such, it is the civil rules governing the time periods for trial which should control. *See* Fla. R. C. P. 1.440 (2000). This court was disinclined to accept that position in the *Kinder* case, because the State did not "urge us to find that the legislature unconstitutionally usurped the court's rule making authority in enacting section 394.916(1)," further finding that the issue was therefore not properly before this Court. *See Kinder* at D1637.

It is well settled that the power to enact substantive law abides in the legislature, while the Supreme Court is authorized to enact procedural law. *See Johnson v. State*, 336 So. 2d 93 (Fla. 1976) and Art. V, Section 2(a), Fla. Const. The difference between procedural and substantive law was discussed recently in the case

of *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000). In that case, the Court, citing Justice Adkins concurring opinion in *In re Rules of Criminal Procedure*, 272 So. 2d 65,66 (Fla. 1972), stated:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. . . .The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of it initiation until final judgment and its execution. *Allen v. Butterworth*, at 60.

A review of Fla. R. Civ. P. 1.440 (2000) clearly indicates the conflict between the rules and the statute. As noted earlier, it is well settled that the authority to enact rules of procedure lies with the Supreme Court, not the legislature. "The legislature has the authority to repeal judicial rules by a two-thirds vote, but the authority to initiate rules rests with the Court." (Citations omitted.) *Allen v. Butterworth* at 59. The issue of when an action is to be set for trial is procedural. Consequently, the rules of civil procedure should control. *R.J.A. v. Foster*, 603 So. 2d 1167 (Fla. 1992).

The 30-day trial rule as found in Section 394.916(1) Fla. Stat. (1999) is not jurisdictional, and the failure to comply with the rule does not divest the trial court of the authority to proceed. The lower court, in this case, mistakenly believed that

the failure to hold a civil commitment trial on a petition filed under this act divested the court of jurisdiction and required the dismissal of the petition. This determination was erroneous and the lower court's order dismissing the petition for civil commitment should be reversed.

CONCLUSION

Appellant respectfully requests that the order entered by the lower court, granting the Respondent's motion to dismiss the petition for civil commitment, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, P.O. Box 9000–Drawer PD, Bartow, Florida 33831 on this the _____ day of August, 2000.

Assistant Attorney General