IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JUAN NAVEIRA,

Respondent.

CASE NO. SC02-633

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Parties (such as the State and Respondent, JUAN NAVEIRA), emphasis, and the record on appeal will be designated as in the Initial Brief; "IB" will designate Petitioner's Initial Brief, AND "AB" will designate Respondent's Answer Brief, each followed by any appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

In his Statement of the Case and Facts, Respondent states, "[t]he extreme delay in filing the information was only partly due to a witness problem, it was primarily caused by the prosecutor's neglect," citing the record at page 48 (AB 1). The State asserts that the record shows no such thing.

At the hearing on Respondent's notice of expiration, the prosecutor stated that they had some difficulty locating and interviewing the minor victim (R 48). The prosecutor clarified that it was not impossible to contact the victim, but that this difficulty was the reason for the delay. Id. Accordingly, the State acknowledged that the delay was not attributable to the accused. Id.

Nowhere did prosecutor, or the court, suggest that "neglect" was the "primary cause" of the delay, and Respondent's assertion to the contrary misrepresents the record.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY "CHARGING TO THE STATE" A CONTINUANCE REQUESTED BY RESPONDENT ON THE GROUND THAT THE STATE'S DELAY IN FILING THE INFORMATION PREVENTED HIM FROM ADEQUATELY PREPARING FOR TRIAL, AND THEN SUBSEQUENTLY DISCHARGING RESPONDENT WHEN THE STATE DID NOT TRY APPELLANT WITHIN THE TIME PERMITTED BY RULE 3.191 BECAUSE OF THE CONTINUANCE?

Respondent has cast his argument as a claim that he is entitled to discharge because he should not be "forced" to waive one right (the right to adequate time to prepare for trial and to discovery) in order to preserve another (the time limits set forth in Rule 3.191). In order to make this argument, Respondent glosses over the procedure by which Rule 3.191 ensures speedy trial. Florida's system for ensuring speedy trials does not require the state to try criminal defendants within any particular amount of time; it merely permits defendants to require the state to try them on short notice if particular conditions are met. Respondent in this case voluntarily invoked this procedure; he was not "forced" to do anything.

As a preliminary matter, it must be repeated that the time limits set forth in Rule 3.191 are **not** of constitutional dimension. State v. Bivona, 496 So.2d 130, 133 (Fla. 1986)("Florida's speedy trial rule is a procedural protection and, except for the right to due process under the rule, does not reach constitutional dimension"). Accordingly, any

suggestion that waiving Rule 3.191 time limits constitutes a waiver of constitutional rights is false. A defendant who waives the Rule 3.191 time limits retains the constitutional right to speedy trial, which is measured in terms of reasonableness and prejudice, not the number of days since arrest. Butterworth v. Fluellen, 389 So.2d 968 (Fla.1980); Gallego v. Purdy, 415 So.2d 166 (Fla. 4th DCA 1982). Respondent has not properly alleged, and cannot show, a constitutional speedy-trial violation.

Respondent denies that filing a notice of expiration constitutes a request for the State to try him within the recapture period set forth the rule. In fact, the consequence of filing a notice of expiration is clearly set forth in Rule 3.191(p)(2)& (3):

> (2) At any time after the expiration of the prescribed time period, the defendant may file a separate pleading entitled "Notice of Expiration of Speedy Trial Time," and serve a copy on the prosecuting authority.
>
> (3) No later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall hold a hearing on the notice and, unless the court finds that one of the reasons set forth in subdivision (j) exists, shall order that the defendant be brought to trial within 10 days. A defendant not brought to trial within the 10-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime.

Respondent claims that a notice of expiration “is a notice to the trial judge that the speedy trial period provided by the

rule has expired and an inquiry must be made into the circumstances," and that "a defendant not brought to trial in the recapture period through no fault of the defendant is entitled to discharge" (AB 13). The State submits that this is a disingenuous description of the process. This description goes from "notice" that 175 days has elapsed, to "inquiry" into the circumstances of the delay, straight to "discharge" if the defendant is not tried in the recapture period. Respondent skips over the portion of the rule that requires the State to try the defendant within ten days from the hearing on the notice. The inescapable fact is that the very purpose of filing a notice of expiration is to inform the court that 175 days have passed since arrest and to compel the State to try the defendant within 15 days.

The only "right" Respondent realized when 175 days passed without trial was to file a notice of expiration to compel the State to try him within 15 days. Respondent's argument suggests that he has a "right" under the rule to trial within 190 days - 175 days plus the 15-day recapture period, which can be invoked immediately upon the expiration of the basic 175-day period. Because he has a "right" to a trial in that time, Respondent argues that his inability to be prepared in that time can be attributed to the State for filing the information "late." The State submits that this argument misconstrues Rule 3.191. Again, Respondent did not have the right to a trial within a certain number of days; he had only the right to compel the

State to try him within 15 days of filing a notice of expiration. A defendant who files such a notice with the intent of securing his discharge, rather than securing a speedy trial as ensured by Rule 3.191, has violated the spirit of Rule 3.191, which ensures speedy trial, not speedy discharge. See State v. Thomas, 659 So.2d 1322, 1324 (Fla. 3d DCA 1995)(Cope, J., concurring)("The purpose of the speedy trial rule is to assure a speedy trial, not a speedy discharge").

Respondent also suggests that the State committed discovery violations which justified charging his continuance to the State. Respondent cites cases such as Staveley v. State, 744 So.2d 1051 (Fla. 5th DCA 1999), and Hayden v. State, 760 So.2d 1031 (Fla. 2d DCA 2000), for the contention that State discovery violations can justify a defense continuance without waiving the Rule 3.191 time limits, so that the defendant can be discharged if the Rule 3.191 time limits. These cases do not apply here for the simple reason that Respondent cannot identify one provision of Florida Rules of Criminal Procedure 3.220 that was violated by the State, nor can he demonstrate any prejudice

resulting from an alleged discovery violation.[1] See Moore v. State, 697 So.2d 569 (Fla. 3d DCA 1997).

Respondent attempts to create a "discovery violation" by claiming that the State's failure to "provide discovery within sufficient time to allow [him] to prepare for trial without forfeiting his right to a speedy trial" (AB 12). This argument is circular, and still does not allege a violation of the rules of discovery that would justify a continuance "charged to the State." The fact is, the State committed no violation of the discovery rules. Accordingly, Respondent's request to continue a trial that had been scheduled solely because he had requested that it be scheduled, constituted a waiver of the Rule 3.191 time limits, and the court erred in "charging" such continuance to the State.

Respondent's argument would result in a speedy-trial morass not envisioned by this Court or Rule 3.191. Currently, the State may try a defendant in the recapture period if the information was filed before the expiration of the basic period set forth in Rule 3.191(a). See Genden v. Fuller, 648 So.2d 1183 (Fla. 1994). Respondent's argument would require trial courts

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[1]Respondent slips into his brief the allegation that this was "a serious case involving a child victim **and DNA evidence**" (AB 7). Respondent knows that the State was willing to try the case with only one witness. His suggestion that the case involved "DNA evidence" is, to put it mildly, inconsistent with the record. Respondent cannot demonstrate prejudice from alleged discovery violations when the State was willing to try him with one witness.

to determine whether the information, even when filed within 175 days from arrest, was filed "too late" to permit the defendant to prepare for trial and therefore permits a speedy-trial discharge. For instance, would an information filed two months before the expiration of the Rule 3.191(a) period be "too late" if the case was complex and required at least three months of preparation time? The State submits such a determination would result in inconsistent application of Rule 3.191, and is utterly unnecessary given the structure of the rule. A defendant who desires more time to prepare for trial after the basic period has expired should not be permitted to have the court schedule a trial by filing a notice of expiration, and to then move for a continuance because he is unprepared for such a trial.

For these reasons, the trial court erred in discharging Respondent, and the district court erred in affirming the discharge. This Court should reverse and remand for trial.

ISSUE II

> DID THE TRIAL COURT ERR IN RULING THAT, AFTER A SUCCESSFUL STATE APPEAL, IT COULD STILL DECIDE WHETHER THE STATE HAD FAILED TO TRY RESPONDENT WITHIN THE RECAPTURE PERIOD OF RULE 3.191(P), WHEN THE STATE ARGUED THAT THE RECAPTURE PERIOD NO LONGER APPLIED AFTER AN APPEAL AND THAT 3.191(M) PROVIDED THE CORRECT POST-APPEAL SPEEDY-TRIAL PERIOD?

Respondent attempts to distinguish State v. Rohm, 645 So.2d 968 (Fla. 1994) by observing the following:

> ... in that case there was still time remaining in the recapture period when the appeal was taken. In this case there was no time remaining in the recapture period so [Respondent] could not be brought to trial.

(AB 16).

While this distinction is accurate, it is an irrelevant distinction under the circumstances of this case. The reason that this matter was not resolved during the recapture period is attributable to Respondent (by moving for a continuance during the recapture period) and the trial court ((by granting the continuance and then waiting until the recapture period had expired before granting the motion for discharge). The State cannot be faulted for the running of the recapture period under these circumstances.

The trial court had two reasons for granting Respondent's motion for discharge. The first reason was its erroneous conclusion that the State failed to file the information until the 176th day following arrest. Since such a violation would not entitle the State to the benefit of the recapture period, Genden v. Fuller, the trial court could have immediately discharged Respondent, prior to the running of the recapture period. Instead, the court waited until after the recapture period had expired before ruling (erroneously) that the information had not been filed timely.

The State was willing and ready to try Respondent during the recapture period. It was only the action of Respondent and the trial court (by granting the continuance and then waiting until the recapture period had expired before granting the motion for discharge) that prevented this issue from being addressed during the recapture period. If the court had addressed these issues

during the recapture period, there would be no distinction whatever between this case and Rohm. Accordingly, there is no reason why this case should be treated differently than Rohm.

The DCA erred in ruling that the 90-day post-appeal speedy-trial period of Rule 3.191(m) did not apply following remand from Naveira I. Such ruling improperly applied the speedy-trial rule, and in any event, directly conflicted with this Court's correct ruling in State v. Rohm. This Court should reverse and remand for trial.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 807 So.2d 766 should be disapproved, and the order discharging Respondent entered in the trial court should be reversed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Erik Courtney, Esq., 1507 N.W. 14th Street, Miami, Florida 33125, by MAIL on December 9, 2002.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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