IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

WILLIAM C. BULGIN,

Appellee.

CASE NO. 1D02-3934

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, the State of Florida, was the prosecution below; the brief will refer to Appellant as such, the prosecution, or the State. Appellee, William C. Bulgin, was the defendant in the trial court; this brief will refer to Appellee as such, Defendant, or by proper name.

The record on appeal consists of one consecutively numbered volume, which will be referenced according to the letter “R”, followed by the appropriate page number. "IB" will designate Appellant's Initial Brief, followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On December 15, 2000, Appellee was arrested by the Florida Department of Law Enforcement (FDLE) for the sale of a controlled substance (R 1,16). On that same date, Appellee agreed to cooperate with law enforcement in a continuing drug investigation and was released (R 1,16). On December 20, 2000, Appellee retained an attorney who, and on the next day, accompanied him to the FDLE office to complete paperwork (R 1,17). Appellee signed an agreement to cooperate with the FDLE, but did not sign a waiver of speedy trial (R1,17). The

agreement was a substantial assistance agreement, whereby Appellee agreed to help law enforcement, and in return, Appellee minimized his exposure (R 23). In exchange for Appellee's cooperation, the State agreed that no charges would be filed and that he would not be held in custody (R 26).

Appellee assisted and cooperated with the FDLE in its investigation for a period of time (R 1,18). At some point, the agreement to cooperate between the FDLE and Appellee soured, and on March 22, 2002, the FDLE obtained a warrant for Appellee's arrest (R 2). Appellee was arrested, and on April 16, 2002, the State filed an Information charging Appellee with the sale of a controlled substance, a second degree felony (R 2). On August 30, 2002, Appellee filed a Notice of Expiration of Speedy Trial and Motion for Discharge (R 2).

On September 5, 2002, the trial court held a hearing on Appellee's Motion for Discharge (R 16). Appellee argued that he was entitled to an automatic discharge and the State was not entitled to the 15 day recapture period because the State failed to file an Information or bring Appellee to trial within the speedy trial time requirements set forth in Florida Rule of Criminal Procedure 3.191 (R 18-22). The State argued that the trial court should deny the motion for discharge, pursuant to Florida Rule of Criminal Procedure 3.191(j)(2), because the failure to hold trial was attributable to Appellee (R 23-6).

On September 16, 2002, the trial court entered an Order Granting Defendant's Motion for Discharge (R 1). The trial

court held that "[b]ecause the defendant was arrested in December 2000; because the information charging document was not filed until more than 500 days later without the defendant having been brought to trial; and because of the state of the case law as it currently exists, the defendant is entitled to be discharged in this case" (R 2-3).

On September 24, 2002, the State filed a timely Notice of Appeal appealing the trial court's Order Granting Defendant's Motion for Discharge (R 4). This Initial Brief follows.

SUMMARY OF ARGUMENT

ISSUE I.

The trial court abused its discretion by failing to deny the motion for discharge and set it for trial within 90 days of the denial, in accordance with Florida Rule of Criminal Procedure 3.191(j). The speedy trial time period began on the date of Appellee's first arrest and continued for a period exceeding the 175 days mandated by Florida Rule of Criminal Procedure 3.191(a). However, when determining whether the State exceeded the speedy trial time period, the trial court failed to consider the effect of the substantial assistance agreement between Appellee and the FDLE that prevented the State from proceeding to trial. Florida Rule of Criminal Procedure 3.191(j) provides for the denial of a motion for discharge brought on speedy trial grounds if the failure to hold trial is attributable to the accused. In the case at hand, the State's failure to hold trial was attributable to Appellee, a result of the substantial assistance agreement. Thus, the trial court abused its discretion by failing to deny Appellee's motion for discharge.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING APPELLEE'S MOTION FOR DISCHARGE.

Standard of Review

A trial court's decision to extend or not to extend speedy trial limits based on its determination of whether the failure to hold trial is attributable to the accused is reviewed for an abuse of discretion. See Routly v. State, 440 So. 2d 1257, 1261 (Fla. 1983) (no abuse of discretion in extension of speedy trial for unavailable witness); Westberry v. State, 700 So. 2d 1236 (Fla. 1st DCA 1997)(trial court's finding of exceptional circumstances for extending speedy trial time period is reviewed under abuse of discretion standard); Hobbs v. State, 689 So. 2d 1249, 1251 (Fla. 4th DCA 1997)(granting extension of speedy trial for exceptional circumstances is discretionary and finding no abuse of discretion).

Preservation

At the September 5, 2002, hearing on Appellee's Motion for Discharge, the State argued that the trial court should deny the motion for discharge, pursuant to Florida Rule of Criminal Procedure 3.191(j)(2), because the failure to hold trial was attributable to Appellee (R 23-6). This is the argument

asserted in this appeal and thus, was preserved for appellate review.

Merits

Florida Rule of Criminal Procedure 3.191(a) provides:

> **(a) Speedy Trial without Demand.** Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime by indictment or information shall be brought to trial within 90 days if the crime charged is a misdemeanor, or within 175 days if the crime charged is a felony. If trial is not commenced within these time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p). The time periods established by this subdivision shall commence when the person is taken into custody as defined under subdivision (d). A person charged with a crime is entitled to the benefits of this rule whether the person is in custody in a jail or correctional institution of this state or a political subdivision thereof or is at liberty on bail or recognizance or other pretrial release condition. This subdivision shall cease to apply whenever a person files a valid demand for speedy trial under subdivision (b).

It is well-settled that the time limitations required by the speedy trial rule begin when a person is first arrested and taken into custody. See Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994)(speedy trial time commences when accused taken into custody, not when charges filed); Weed v. State, 411 So. 2d 863, 865 (Fla. 1982)(date of original arrest is focal point for speedy trial considerations); Thigpen v. State, 350 So. 2d 1078 (Fla. 4th DCA 1977)(speedy trial time begins when defendant first taken into custody); Allen v. State, 275 So. 2d 238 (Fla. 1973)(speedy trial commenced when defendant taken into custody).

The State cannot circumvent the speedy trial rule by arresting an accused, entering a nol pros, and then re-arresting the accused for the same conduct to restart the speedy trial time period. "[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." State v. Agee, 622 So. 2d 473, 475 (Fla. 1993). See Ryan v. State, 768 So. 2d 19, 20 (Fla. 3d DCA 2000)(State cannot circumvent speedy trial rule by nol prossing charge and filing new information based on same criminal episode). Additionally, under these circumstances, the accused was entitled to an automatic discharge, and the State was not entitled to the recapture window set forth in Florida Rule of Criminal Procedure 3.191(p)(3)[1]. Id. at 476.

The reasoning behind permitting the automatic discharge and not applying the recapture window is found in Diaz v. State, 627 So. 2d 125 (Fla. 5th DCA 1993). The Fifth District Court of Appeal noted that in Agee, the accused was entitled to an automatic discharge because there was no case in court in which he could assert his speedy trial rights at the end of 175 days: "[T]he defendant was deprived by the State of his right to seek discharge at the end of the prescribed period or 175 days -

[1] Florida Rule of Criminal Procedure 3.191(p)(3) provides that if the accused files a Notice of Expiration of Speedy Trial Time, the trial court shall hold a hearing within 5 days to determine if the speedy trial time has expired, and if so, the State must bring the accused to trial within 10 days (the recapture period).

hence, he was thereafter entitled to *automatic* discharge upon the refiling of the charge." Id. The court contrasted Agee with the facts in Diaz, where there was a pending case at the end of 175 days, and found that "[Diaz] was not entitled to an automatic discharge, as was Agee, because at the end of the 175 day period the case was in court and the procedural remedy of filing a motion for discharge was available to Diaz at the time." Id. at 126.

The Florida Supreme Court expanded the application of the speedy trial rule in Genden v. Fuller, 648 So. 2d 1183, 1184 (Fla. 1994) when it concluded that the State cannot toll the speedy trial time by entering a "no action" prior to filing formal charges. The 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 has expired." Id. at 1185. See Leslie v. State, 699 So. 2d 832 (Fla. 3d DCA 1997)("no action" filed by State after defendant taken into custody does not toll the speedy trial time period). See also Williams v. State, 757 So. 2d 597, 598 (Fla. 5th DCA 2000)(initial arrest begins speedy trial time and "unarrest" does not toll time period).

In State v. Williams, 791 So. 2d 1088, 1091 (Fla. 2001), the Court further expanded the speedy trial time period by holding that "the speedy trial time begins to run when an accused is

taken into custody and continues to run even if the State does not act until after the expiration of that speedy trial period." In other words, no action, including the State's failure to file an Information, was the equivalent of filing a "no action" pleading for purposes of the speedy trial time period. Additionally, as in Genden, the State was not entitled to a recapture period under Florida Rule of Criminal 3.191(p)(3). Id. See Williams v. State, 774 So. 2d 23, 24 (Fla. 2d DCA 2000)(speedy trial period began when defendant in custody and was not tolled by State's failure to file information).

In the case at hand, it appears, at first glance, that the speedy trial time period expired. Appellee was arrested on December 15, 2000, and the speedy trial time period began to run. The State did not file an Information and took no action. On March 22, 2002, (462 days after speedy trial time period began to run) the FDLE obtained a warrant for Appellee's arrest. Appellee was arrested, and on April 16, 2002, (487 days after speedy trial time period began) the State filed an Information charging Appellee with the sale of a controlled substance, a second degree felony. To be sure, the 487 days well exceeds the 175 speedy trial time period mandated by Florida Rule of Criminal Procedure 3.191(a).

However, when determining whether the State exceeded the speedy trial time period, the trial court failed to consider the effect of the substantial assistance agreement between Appellee and the FDLE that prevented the State from proceeding to trial.

By that agreement, Appellee agreed to help law enforcement, and in return, Appellee minimized his exposure (R 23). In exchange for Appellee's cooperation, the State agreed that no charges would be filed and that he would not be held in custody (R 26). The substantial assistance agreement prevented the State from filing charges against Appellee. To be sure, a direct and unavoidable consequence of the State not being able to file charges was the State's failure to hold a trial.

Florida Rule of Criminal Procedure Rule 3.191(p) provides that no remedy will be granted under the speedy trial rule until the court has considered Florida Rule of Criminal Procedure 3.191(j). Florida Rule of Criminal Procedure 3.191(j) provides:

> (j) Delay and Continuances; Effect on Motion. If trial of the accused does not commence within the periods of time established by this rule, a pending motion for discharge shall be granted by the court unless it is shown that:
>
> (1) a time extension has been ordered under subdivision (i) and that extension has not expired;
> **(2) the failure to hold trial is attributable to the accused, a codefendant in the same trial, or their counsel;**
> (3) the accused was unavailable for trial under subdivision (k); or
> (4) the demand referred to in subdivision (g) is invalid.

"[A] defendant is not entitled to discharge for expiration of the time provided under the rule where the failure to hold trial is attributable to the defense." Dechaine v. State, 751 So.2d 100, 102 (Fla. 4th DCA 1999).

> Subsection (d)(3)[, a precursor of Subsection (j)] of rule 3.191 provides for the discharge of a defendant on speedy trial grounds unless certain exceptions set

> forth in that subsection exist. Examples of those exceptions are the prior ordering of an extension of the speedy trial time or the failure to hold trial having been attributable to the defendant. That is, that subsection provides for certain exceptions by reason of which a defendant shall not be discharged even though the otherwise applicable speedy trial time periods have expired.

State v. Lazarus, 433 So.2d 1314, 1315 (Fla. 2d DCA 1983). In State v. Jordan, 436 So.2d 291 (Fla. 2d DCA 1983), the appellate court denied a motion for discharge brought on speedy trial grounds because the appellee had used dilatory tactics to delay the trial until it exceeded the speedy trial time period.

> As to the conspiracy charge, the 180-day speedy trial period commenced on October 15, 1981, the date the information was filed on the conspiracy charge, inasmuch as defendant had not been previously arrested as a result of the conduct which gave rise to the conspiracy charge. See Snow v. State, 399 So.2d 466 (Fla. 2d DCA 1981). However, the failure to try him within 180 days was not violated because he himself instigated dilatory tactics on February 22, 1982. In Butterworth v. Fluellen, 389 So.2d 968 (Fla.1980), the supreme court recognized that if a codefendant causes a delay or moves for a continuance which results in a trial date outside of the speedy trial time period, he waives the 180-day provision of the speedy trial rule. Moreover, quoting from rule 3.191(d)(3)(ii), "a motion for discharge shall be granted by the court unless it is shown that the failure to hold trial is attributable to the accused, a codefendant in the same trial, or their counsel." Thus, the court erred in discharging defendant as to the conspiracy charge.

Id. at 293.

In the case at hand, the State's failure to hold trial within the speedy trial time period was attributable to Appellee, a result of the substantial assistance agreement. By entering into the substantial assistance agreement, Appellee delayed the State from filing the Information and going to trial. Appellee

minimized his legal exposure, succeeded in not having any charges filed against him, and attained his release from custody - all to his benefit. As an additional benefit and necessary consequence of the agreement, Appellee delayed the trial. The State's failure to hold the trial within the speedy trial time period, resulting from Appellee entering into the substantial assistance agreement, is directly attributable to Appellee.

Without the substantial assistance agreement, the State would have been free to charge Appellee by Information immediately after the first arrest and to proceed to trial within the speedy trial time. Instead, Appellee entered into an agreement by which the State agreed not to file an Information, a direct and unavoidable result of which was the State's inability to proceed to trial. The State's inability to file the Information and proceed to trial was a direct result of Appellee's agreement to enter into the substantial assistance agreement. Thus, the failure to hold the trial within the speedy trial time period was attributable to Appellee, and the trial court abused its discretion by failing to deny the motion for discharge and set it for trial within 90 days of the denial, in accordance with Rule 3.191(j).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court reverse the trial court's granting of Appellee's motion for discharge, and remand for a trial on the charges set forth in the Information.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Frederick Conrad, 908 Thomasville Road, Tallahassee, Florida 32303, by MAIL on November _____, 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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