IN THE SUPREME COURT OF FLORIDA

BRANDON P. PELKY,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. SC03-2217

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant in the District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, BRANDON P. PELKY, the Appellee in the district court and the defendant in the trial court, will be referenced in this brief as Petitioner.

The record on appeal consists of one volume, which will be referenced as “R,”. “IB” will designate Petitioner’s Initial Brief. Each symbol will be followed by the appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner’s statement of the case and facts.

SUMMARY OF ARGUMENT

Williams v. State, 757 So.2d 597 (Fla. 5th DCA 2000), does not conflict with the district court decision under review, because it was interpreting a different provisions of Rule 3.191. Nor does the decision under review conflict with State v. Agee, 622 So. 2d 473, 475 (Fla. 1993); Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994); or State v. Williams, 791 So.2d 1088, 1091 (Fla. 2001). In none of those cases was this Court addressing the issue of whether a Rule 3.191(f) exception to the time limits of Rule 3.191(a) applied. The decision under review is consistent with these cases.

The district court correctly concluded that the failure to try Petitioner within the Rule 3.191(a) limits was attributable to the his cooperation agreement because the agreement postponed the charges and court proceedings until his assistance was complete, and that the "delay attributable to the accused" exception applied. There is no requirement that "court proceedings" must have been initiated before this exception can apply, and such a requirement would run afoul of the basic principles of Rule 3.191. Moreover, the fact that the State participated in the agreement does not mean that the delay was not attributable to Petitioner.

Finally, Petitioner's position that the State cannot try a defendant who has participated in an assistance agreement after the Rule 3.191(a) period has expired unless it has secured a waiver of the Rule 3.191 time limits is untenable. The Rule has

procedures in place to address the speedy-trial concerns of a defendant in this situation. There is no reason why the State should be obligated to force persons who cooperate with them to waive their substantial rights under Rule 3.191 as a condition of obtaining their assistance. Such a rule places an unnecessary burden on the State, who may lose the benefit of cooperation from defendants not willing to waive these rights, and on defendants, who are required to unnecessarily waive rights under the rule.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DISCHARGING PETITIONER PURSUANT TO RULE 3.191 WHEN THE FAILURE TO HOLD TRIAL WAS ATTRIBUTABLE TO PETITIONER'S ENTRY INTO A SUBSTANTIAL ASSISTANCE AGREEMENT AFTER ARREST? (Restated)

INTRODUCTION

The trial court in this case granted Petitioner's motion for discharge filed pursuant to Florida Rules of Criminal Procedure 3.191. The State appealed to the First District Court of Appeal, which reversed. State v. Bulgin, 858 So.2d 1096 (Fla. 1st DCA 2003). The district court ruled that the failure to hold trial within the time limits set forth in Rule 3.191(a) was attributable to Petitioner's cooperation agreement because the agreement "postponed the charges and court proceedings until their assistance was complete." Bulgin at 1097. Because the failure to hold trial was "attributable to the accused," the district court concluded that the trial court should not have granted the motion for discharge, pursuant to Rule 3.191(j)(2).

The district court rejected Petitioner's argument that Williams v. State, 757 So.2d 597 (Fla. 5th DCA 2000) required affirmance. The district court agreed with the holding of the Williams v. State court that a so-called "unarrest" does not toll the time limits of Rule 3.191(a), but noted that no such "unarrest" was attempted here, and distinguished Williams v. State on the ground that court it never addressed the applicability of Rule 3.191(j)(2), i.e., the argument that the

substantial assistance agreement constituted a delay that was attributable to the accused. Bulgin at 1097-1098.

JURISDICTION

Petitioner petitioned this Court to accept jurisdiction to review the district court decision on the ground that it expressly and directly conflicted with a decision of another district court of appeal, Williams v. State, on the same question of law. See Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court accepted jurisdiction. The State respectfully requests this Court to find that no jurisdiction exists because the decision below and the Williams v. State decision do not expressly and directly conflict.

It is well-settled that this Court's discretionary conflict jurisdiction can be invoked only when two **decisions** conflict. See Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970)("It is conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari")(emphasis in original). See also Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980).

The "decision" in Williams v. State is clear. First, the State may not toll the running of the Rule 3.191(a) time period by effecting an so-called "unarrest." Second, the court rejected the State's argument that the defendant was "unavailable" pursuant to Rule 3.191(k). Accordingly, the court found that the unavailability exception set forth in Rule 3.191(j)(3) did not apply.

Neither of these decisions of the Williams v. State court were rejected by the district court in the case at bar. The district court here fully agreed that an "unarrest" does not toll the applicable time periods, but noted that no such thing was attempted here. More importantly, the district court did not address the "unavailability" exception contained in Rule 3.191(j)(3). Rather, the State had invoked a different exception contained in Rule 3.191(j), specifically, subdivision (j)**(2)**, which provides an exception when the "failure to hold trial is attributable to the accused." There is nothing to suggest that the (j)(2) exception was even argued in Williams v. State, much less the basis for the decision, whereas the (j)(2) exception was the entire basis for the ruling below. The district court below recognized this in its opinion: "the exception under the speedy trial rule upon which we base our ruling, Fla. R. Crim. P. 3.191(j)(2), was not decided in Williams." Bulgin at 1097-1098 (footnote omitted).

Williams v. State and the decision below did not even address the same provision of the speedy-trial rule, much less provide expressly and directly conflicting decisions. The State respectfully requests this Court to reconsider its decision to accept jurisdiction, and find that it was improvidently granted.

However, even if these decisions did expressly and directly conflict, the decision below should be approved.

MERITS

a. Applicable provisions of Rule 3.191

Florida Rules of Criminal Procedure 3.191(a) provides in pertinent part:

> **(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 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. ....

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, not when charges are first filed. Genden v. Fuller, 648 So. 2d 1183, 1184 (Fla. 1994); Weed v. State, 411 So. 2d 863, 865 (Fla. 1982)(date of original arrest is focal point for speedy trial considerations).

Subdivision (p) of Rule 3.191 sets forth the following procedures in the event that the defendant is not brought to trial within the time limitations set forth in subdivision (a):

> **(p) Remedy for Failure to Try Defendant within the Specified Time.**
> (1) No remedy shall be granted to any defendant under this rule until the court

> has made the required inquiry under subdivision (j).
>
> (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.

As stated, the hearing on the notice requires an inquiry to under subdivision (j). Subdivision (j) reads as follows:

> **(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.
>
> If the court finds that discharge is not appropriate for reasons under subdivisions (j)(2), (3), or (4), the pending motion for discharge shall be denied, provided, however, that trial shall be scheduled and commence within 90 days of a written or recorded order of denial.

b. Agee, Fuller, and State v. Williams

Prior to 1984, the State was explicitly required to try criminal defendants within a certain number of days after arrest (180 days for a felony), and "if not brought to trial within such time shall upon motion timely filed with the court having jurisdiction and served upon the prosecuting attorney be forever discharged from the crime." Rule 3.191(a)(1) (1983). This procedure was significantly altered in 1984 when this Court added the "recapture" provision to the speedy-trial rule, currently subdivision (p) of the Rule. The Florida Bar Re: Amendment to Rules-Criminal Procedure, 462 So.2d 386 (Fla. 1984).

One of the consequences of the recapture provision was that the State could file an information at any time, regardless of how long had passed since arrest, and simply claim that it could try the defendant within the recapture period. This Court has addressed this consequence in a series of cases, concluding that if the State does not file an information within the basic period set forth in Rule 3.191(a), it cannot invoke the recapture period of Rule 3.191(p), and the defendant is entitled to discharge. See State v. Agee, 622 So. 2d 473, 475 (Fla. 1993); Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994); Reed v. State, 649 So.2d 227 (Fla. 1995); State v. Williams, 791 So.2d 1088, 1091 (Fla. 2001).

The State recognizes the applicability of these cases to the case at bar, inasmuch as it is undisputed that the State did not

file the information until more than 175 days following Petitioner's arrest. Thus, unless this Court intends to revisit the rulings in those cases, Petitioner would be entitled to discharge without permitting the State to try him within the recapture period, *unless an exception applies*. Nowhere in Agee, Fuller, or State v. Williams does it appear that the State argued that the defendant was not entitled to discharge because one of the exceptions contained in Rule 3.191(j). The issue here is whether the delay was attributable to Petitioner, which would have required his motion for discharge to be denied and would have given the State 90 days of the order denying discharge. Neither Agee, Fuller, nor State v. Williams mandate any resolution to this matter.

c. The Rule 3.191(j) exceptions

The district court ruled that Petitioner's trial did not commence within the time period under Rule 3.191(a). As such, the district court ruled that Petitioner would be entitled to discharge unless one of the exceptions in Rule 3.191(j) applied. One of those exceptions is that "the failure to hold trial is attributable to the accused." Fla. R. Crim. P. 3.191(j)(2). The district court ruled that this exception applied here:

> Here, the failure to hold trials for the defendants within the speedy trial rule was attributable to the defendants' cooperation agreements because the agreements postponed the charges and court proceedings until their assistance was complete. Therefore, the exception to the speedy trial rule applies, and the trial courts should have denied the motions for discharge.

Bulgin at 1097.

As a preliminary matter, the State notes again that this decision does not conflict in any way with Agee, Fuller, or State v. Williams. None of those cases involved the applicability of an exception under Rule 3.191(j).

Petitioner gives essentially two reasons why this ruling is incorrect. First, Petitioner claims that the Rule 3.191(j)(2) applies only to "actions of the defendant that occur after court proceedings have been initiated" (IB 20). According to Petitioner, "if there are no court proceedings, then there is no trial to delay" (IB 20).

The State submits that Petitioner is attempting to have it both ways with this argument. Petitioner argues forcefully that the speedy-trial time begins on the date of the original arrest. If the speedy-trial time did not begin at arrest and instead began at some later point such as booking, filing of information, arraignment, etc., Petitioner would be entitled to no relief at all. The fact that the speedy-trial period begins at the date of original arrest rather than one of these later events is the keystone of Petitioner's argument.

Yet, when arguing whether an exception to the time limitations applies, Petitioner abandons the date of original arrest as the "focal point for speedy trial considerations," Weed v. State, 411 So. 2d 863, 865 (Fla. 1982), and claims instead that "court proceedings" are necessary before the exception can apply. The State has presented the argument that

the "initiation of court proceedings" should be the focal point of speedy-trial analysis numerous times before this Court, and this Court has consistently rejected it. Petitioner cannot argue that date of arrest is the beginning point for his Rule 3.191 rights, but that "court proceedings" are necessary for an exception to apply.

Once the defendant is arrested, the provisions of the speedy-trial rule begin. The "failure to hold trial" is attributable to the accused if the State delayed such "court proceedings" pursuant to an agreement with the defendant. Petitioner's attempt to limit this exception is both unsupported by any authority and is contrary to the structure of the rule.

Petitioner claims that Williams v. State, 757 So.2d 597 (Fla. 5th DCA 2000), supports his argument that the Rule 3.191(j)(2) exception applies only when "court proceedings" have been scheduled. However, as noted, Williams v. State was interpreting a different provision of Rule 3.191(j), subdivision (j)(3), which provides an exception to the time limitations when the defendant is "unavailable for trial under subdivision (k)." Petitioner acknowledges that Williams v. State was interpreting a different provision of Rule 3.191(j), but dismisses this difference by claiming that the exceptions are "similar" (IB 21). The State disagrees.

Subdivision (k) of Rule 3.191 defines the phrase "unavailable for trial" as follows:

> A person is unavailable for trial if the person or the person's counsel fails to

> attend a proceeding at which either' presence is required by these rules, or the person or counsel is not ready for trial on the date trial is scheduled.

Fla. R. Crim. P. 3.191(k).

Subdivision (k) gives two specific instances where a person is "unavailable for trial:" failure to attend a required proceeding, and failure to be ready for a scheduled trial. As these are the only instances where a person can be "unavailable for trial," and because both instances involve a court proceeding, it logically follows that one cannot be "unavailable for trial" if no court proceedings have ever been scheduled, as the Williams v. State court correctly concluded.

The exception in subdivision (j)(2) contains no such limitation. As long as the delay which resulted in the failure to hold trial is attributable to the accused, the subdivision (j)(2) exception applies, and Williams v. State, interpreting a different provision of the rule that specifically refers to court proceedings, does not require a different result.

For this reason, the district court properly relied on Collins v. State, 489 So.2d 133 (Fla. 1st DCA 1986) and State v. Rosenfeld, 467 So.2d 731, 733 (Fla. 3d DCA 1985), in spite of Petitioner's notice of the irrelevant distinction that the conduct by the defendant occurred in those cases after the initiation of court proceedings.

Collins and Rosenfeld, along with Geiger v. State, 532 So.2d 1298, 1301 (Fla. 2d DCA 1988), provide apt examples of delays that were attributable to the accused and therefore did not

justify discharge under Rule 3.191. In Collins, the court affirmed the denial of a motion for discharge because the delay in proceeding was caused by the defendant's petition to change his plea to nolo contendere, even though he was not brought to the court for plea purposes until the deadline expired. In Rosenfeld, the defendant moved to withdraw a previously-negotiated guilty plea, which was granted after the speedy-trial period had run, and was then discharged under Rule 3.191. The court reversed, holding, "[t]he defendant cannot defeat the state's opportunity to charge her by negotiating a plea and then obtaining a favorable ruling, after the speedy trial time has passed, on a motion to withdraw the plea which is filed shortly before the speedy trial time has run." Rosenfeld at 733.

The same reasoning applies here. Petitioner voluntarily entered into an agreement with the State which included a provision that no charges would be filed until his assistance was complete. In effect, Petitioner defeated the State's opportunity to charge him by entering into this agreement which benefitted him as well as the State. The speedy-trial rule is not intended to permit criminal defendants to avoid prosecution based on their own actions which result in delays in prosecution.

The second reason Petitioner gives to support his contention that the Rule 3.191(j)(2) exception cannot apply is his suggestion that "State had exclusive control over when a rearrest and booking would occur" because "it was the State

alone who decided when Petitioner's assistance was complete" (IB 22-23). While these claims are generally true, they do not demonstrate why the (j)(2) exception should not apply. First, the fact that the State was a party to the substantial assistance agreement, or that the State had first suggested the agreement, does not mean that the delay in charging him was attributable to the State. If Petitioner had refused to enter into the agreement, he would have been charged and tried within the speedy-trial period. This is no different than the plea agreement at issue in Rosenfeld. Second, Petitioner has not shown anything to suggest that he could not have terminated the agreement at any time. In fact, if the basic speedy-trial period had expired, Petitioner could have simply filed a notice of expiration under Rule 3.191(p). The court could have found that the delay was attributable to Petitioner because of his entry into the assistance agreement, and the State would have been obligated to try him within 90 days, pursuant to Rule 3.191(j).

The district court correctly concluded that Petitioner's entry into the substantial assistance agreement constituted a delay attributable to the accused that required the denial of his motion for discharge. The fact that no court proceedings had been initiated does not alter this result, nor does the State's part in agreement. Petitioner cannot reap the benefits of the substantial assistance agreement without accepting the

consequences -- that his trial may be delayed to a time after the period in Rule 3.191(a) has expired.

c. Williams v. State

Petitioner places great reliance on the fact that the underlying facts of Williams v. State, 757 So.2d 597 (Fla. 5th DCA 2000), are similar to the case at bar, and the district court there ruled in the defendant's favor. While the facts are similar, as stated above, Williams v. State does not conflict with the decision under review. As such, even if the facts are "indistinguishable," as Petitioner claims, Williams v. State does not suggest that the decision under review was decided incorrectly.

1. "Unarrest"

One of the key material factual distinctions between Williams v. State and the case at bar is that the officers in Williams v. State attempted to effect an "unarrest" on the defendant after he agreed to assist police. The court in Williams v. State concluded that this "unarrest" did not affect the running of the Rule 3.191(a) period. The district court here agreed with that rule of law, but stated that it did not apply here.

Petitioner seizes upon this ruling, arguing that the district court "erred in holding that [his] inability to demonstrate that an 'unarrest' occurred should in some way preclude speedy trial relief" (IB 19). Petitioner's argument misses the mark. The district court here did not rule that

Petitioner was not entitled to relief because he was not "unarrested." The district court was only noting that this particular ruling in Williams v. State was irrelevant because no such thing occurred here. The "unarrest" in Williams v. State is irrelevant to the district court's decision, or to the issues in this review, because no such unarrest took place.

2. Unavailability for trial

As stated above, the Williams v. State court noted that the state had specifically argued that the defendant was "unavailable for trial," and ruled that this exception did not apply. Again, in the case at hand, the court below specifically held that it was not basing its ruling on the unavailability exception of Rule 3.191(j)(3), but on the "delay attributable to accused" exception of Rule 3.191(j)(2). The fact that these two cases may be "indistinguishable" factually, as Petitioner contends, does not mean that the legal decisions are in conflict under these circumstances.

3. Waiver of speedy trial

Perhaps the most noteworthy aspect of Williams v. State on which Petitioner bases his argument is the comment, made in *dictum*, that "i[f] the state is concerned about speedy trial, it could merely obtain a waiver from the defendant, as part of his substantial assistance agreement." Williams v. State at 600. Petitioner claims that this *dictum* comment sets forth a rule of

law that a substantial assistance agreement must contain a waiver of speedy trial, or the State cannot prosecute the defendant if it does not try him within the limits set forth in Rule 3.191. The State disagrees.

Petitioner's argument unnecessarily requires the State to force a defendant to forego a substantial right in order to reap the benefits of an assistance agreement. If a defendant who is participating in an assistance agreement has not waived the Rule 3.191 time limits, the defendant will still retain his right to claim the Rule 3.191(a) time limits if the assistance is completed before the expiration of that period. Moreover, if the assistance agreement continues beyond the basic period set forth in Rule 3.191(a), the defendant may file a notice of expiration pursuant to Rule 3.191(p). Although the court would find that the delay was attributable to the defendant, the State would then be required to try the defendant within 90 days of that finding, pursuant to Rule 3.191(j).

Petitioner has given no reason why the State should be obligated to take these rights away from a defendant merely to secure assistance in exchange for relief from criminal sanctions. The State suggests that defendants may be less willing to enter into beneficial assistance agreements if they are required to waive their Rule 3.191 rights.

Moreover, securing knowing and voluntary waivers of speedy-trial rights may be problematic given the complexity of Rule

3.191. Judge Sharp, specially concurring in the Williams v. State decision, expressed this view:

> I do not think the suggestion that police officers carry waivers of speedy trial time to be signed by persons arrested, and unarrested like Williams, is a good answer. That leads to messy questions, like lack of understanding of rights being waived, need for advice of counsel, etc.

Williams v. State at 601. The State shares Judge Sharp's concern.[1]

Petitioner has given no reason why a defendant agreeing to cooperate with police must be forced to waive his or her Rule 3.191 rights in order to reap the benefits of that assistance, other than that no such waiver was procured in his case. Rule 3.191 is equipped to address speedy-trial situations that would arise from such agreements, and there is no compelling reason it should be abandoned merely because a waiver of the time limits is simpler.

d. Conclusion

Williams v. State does not conflict with the district court decision under review. There is no reason whatsoever to conclude that either Williams v. State or the decision under review constitutes an incorrect application of law, because the decisions are not inconsistent. The district court correctly

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[1]The State also agrees with Judge Sharp's concern that "the speedy trial rule as interpreted by case law, has drastically shortened the statute of limitations for prosecution of crimes, and as such it has become the defendant's best defense and ally." Williams v. State at 601.

concluded that the delay in trying Petitioner was attributable to his entry into a substantial assistance agreement, which delayed the filing of charges and necessarily delayed the trial. Finally, there is no compelling reason why the State should be required to obtain from defendants assisting police a waiver of the Rule 3.191 time limits in order to prevent discharge under this Rule. The State respectfully requests this Court either to find that jurisdiction was improvidently granted, or to approve the decision under review.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 858 So. 2d 1096 should be approved, and the order granting discharge 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 Matthew K. Foster, Esq., and Edward T. Bauer, Esq., Brooks, Leboeuf, Bennett & Foster, 909 East Park Avenue, Tallahassee, Florida 32301 by MAIL on May 11, 2004.

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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