IN THE SUPREME COURT OF FLORIDA

BRANDON P. PELKY,

Petitioner,

S.Ct. Case No. _____

v.

1st DCA Case No. 1D02-5004

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIRST DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER

Matthew K. Foster, Esquire
Florida Bar NO.: 0007927
Edward T. Bauer, Esquire
Florida Bar NO.: 0294690
Brooks, LeBoeuf, Bennett, & Foster
863 East Park Avenue
Tallahassee, Florida 32301
Telephone No.: (850) 222-2000
Facsimile No.: (850) 222-9757
Attorneys for Petitioner

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STATEMENT OF THE CASE AND FACTS

On December 15, 2000, the Petitioner and several co-defendants were arrested for the sale of a controlled substance. The Petitioner agreed to assist law enforcement as a confidential informant, and was immediately released from custody. Approximately five days later, the Petitioner and his attorney met with law enforcement and executed a substantial assistance agreement. Although the agreement contemplated that the Petitioner would not be charged until his assistance was complete, the agreement did not contain a waiver of speedy trial, nor did the parties discuss speedy trial at any time.

More than 175 days following his initial arrest, the Petitioner completed his assistance and was again arrested for the same drug charge for which his was

originally arrested on December 15, 2000. At that point, formal charges were filed for the first time, which the Petitioner moved to dismiss by filing a motion for discharge pursuant to Florida Rule of Criminal Procedure 3.191. Finding a violation of the speedy trial rule, the trial court granted the motion and concluded that the Petitioner was entitled to the automatic discharge due to the failure to hold trial within 175 days of the original arrest.

An appeal was filed by the Respondent to the First District Court of Appeal to review the trial court's order. On October 13, 2003, the First District reversed the trial court's order in a consolidated opinion and held that the failure to hold trial within 175 days was attributable to the Petitioner because the cooperation agreement postponed charges and court proceedings until his assistance was complete. The Petitioner's motions for rehearing and rehearing en banc were subsequently denied on November 17, 2003. The Petitioner's notice to invoke the discretionary jurisdiction of this court was timely filed on December 15, 2003.

SUMMARY OF ARGUMENT

In this case, the district court of appeal holds that despite that fact that no charging document was filed or a trial held within 175 days of the Petitioner's original arrest, the Petitioner was not entitled to discharge pursuant to Fla. R. Crim. P. 3.191. In so holding, the district court reasons that because the substantial assistance agreement contemplated that any charges would be postponed until the Petitioner's assistance was complete, any delay was attributable to the Petitioner and therefore speedy trial relief should have been denied pursuant to Florida Rule of Criminal Procedure 3.191(j)(2). The decision of the district court cannot be reconciled with the decision of the Fifth District Court of Appeal in Williams v. State, 757 So. 2d 597 (Fla. 5th DCA 2000), wherein the court held that the defendant was entitled to speedy trial discharge under factually indistinguishable circumstances. Thus, the Petitioner contends that the First District's decision in this case expressly and directly conflicts with the decision of another district court of appeal on the same point of law.

ARGUMENT AND JURISDICTIONAL STATEMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT IN WILLIAMS V. STATE, 757 SO. 2D 597 (FLA. 5TH DCA 2000).

This Court has authority to exercise its discretionary review of any decision of a district court that expressly and directly conflicts with a decision of another district court on the same question of law. Art. V, § 3(b)(3), Florida Constitution; Fla. R. App. P. 9.030(a)(2)(A)(iv). The decision of the district court directly and expressly conflicts with the Fifth District's decision in Williams with respect to the application of Fla. R. Crim. P. 3.191 to situations in which a defendant is arrested, immediately released pursuant to an assistance agreement that contemplates a delay in the filing of charges, and subsequently rearrested for the same offense after the expiration of the 175 day speedy trial period.

Fla. R. Crim. P. 3.191(a) provides in pertinent part as follows:

> Except as otherwise provided by this rule . . . every person charged with a crime . . . 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 . . . . The time periods established by this subdivision shall commence when the person is taken into custody.

Courts have interpreted rule 3.191(a) to require an automatic discharge without a

recapture period where a defendant is arrested and the state fails to act within the proscribed time limit of 175 days. See, e.g., State v. Hurley, 760 So. 2d 1127, 1128 (Fla. 4th DCA 2000).

In assessing whether the Petitioner was correctly granted discharge by the trial court, the district court's opinion acknowledges that the Petitioner's trial "did not commence within the time periods established by the speedy trial rule," and further observes that the law enforcement officers failed to obtain either oral or written waivers of speedy trial. State v. Bulgin, 28 Fla. L. Weekly D2356 (Fla. 1st DCA October 13, 2003). However, the district court concludes that the lower court erred in granting discharge because rule 3.191(j)(2) precludes relief where the "failure to hold trial is attributable to the accused." The district court reasons that the failure to hold trial was attributable to the Petitioner because the cooperation agreement postponed the charges and court proceedings until his assistance was complete. Id.

The district court decision is in direct conflict with the Fifth District's decision in Williams v. State, 757 So. 2d 597 (Fla. 5th DCA 2000). In Williams, the defendant was arrested for sale of cocaine. 757 So. 2d at 598, 599. Identical to the Petitioner in the instant case, the defendant in Williams offered to serve as a confidential informant, and pursuant to his substantial assistance agreement, was

allowed to leave police custody with the understanding that he would be rearrested and charged at a later time. Id. at 599-600. As a result, "no court proceedings were ever scheduled and the trial was never set." Id. at 600. At the conclusion of his cooperation with law enforcement, just as in the instant case, the defendant was again arrested for the same delivery of cocaine for which he had once been arrested and then "unarrested." Id. at 598. Following his second arrest for the same offense, the defendant's case was scheduled for court proceedings for the first time. Id. at 598, 600. The defendant subsequently filed a motion for speedy trial discharge, which was denied by the trial court. Id. at 598.

In holding that the defendant's motion for discharge should have been granted, the Fifth District reasoned that speedy trial began to run on the date of the defendant's **initial arrest** and expired prior to the defendant being brought to trial. See id. at 598-600. The court further held that the protections of the rule could not be avoided by the police "unarresting" the defendant (i.e., law enforcement releasing the defendant without booking him), and therefore "for the purposes of the speedy trial rule, at least, **there is no such thing as an 'unarrest**'." See id. at 598 (emphasis added). Significantly, the court also held that the defendant could not be estopped from claiming protection under the speedy trial rule simply because he entered into a substantial assistance agreement. Id. at 600. Finally, and

most importantly, the court held that the defendant's discharge could have been avoided if the State had obtained a waiver of speedy trial as part of the defendant's cooperation agreement. See id. at 600.

There can be no question that the decision of Williams and of the district court in the instant case are directly in conflict. The Williams decision plainly holds that a defendant is entitled to speedy trial discharge if a trial does not commence within 175 days of the original arrest even where the defendant enters into a substantial assistance agreement that provides for his immediate release and contemplates a delay in the filing of charges until the assistance is complete. Williams, 757 So. 2d at 598-600. Only if the substantial assistance agreement contains a waiver of speedy trial, the Williams decision holds, would the defendant be precluded from obtaining speedy trial discharge. Id. at 600. On the other hand, the district court in the instant case holds under identical factual circumstances that where a substantial assistance agreement contemplates a delay in the filing of charges, the delay is attributable to the defendant and accordingly the defendant cannot claim the protection of the speedy trial rule, even if law enforcement fails to obtain a waiver of speedy trial as part of the agreement.

It is critical to observe that the direct and express conflict is not reconciled by the district court's two grounds for distinguishing Williams. Specifically, the

opinion below reads as follows with respect to Williams:

> The Fifth District Court of Appeal held that the initial arrest starts the running of the speedy trial time and that, for the purposes of the rule, **there is no such thing as an "unarrest**." **We agree with that holding**, but that is not the case presented here. The **defendants were not subject to any procedures labeled an "unarrest**," and 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, 28 Fla. L. Weekly D2356 (emphasis added).

Strangely, as the foregoing passage demonstrates, the district court announces its agreement with the Williams court that there is no such thing as an "unarrest," yet in the next sentence brings its decision into direct and express conflict with Williams by denying the Petitioner the protection of the speedy trial rule for failing to demonstrate an "unarrest" occurred. In addition, even if an "unarrest" existed for the purposes of the speedy trial rule, it would be the **State**, not the accused, attempting to demonstrate that an "unarrest" occurred, as an "unarrest" would presumably toll the running of speedy trial, whereas an **arrest** starts the running of the speedy trial period. See Fla. R. Crim. P. 3.191(d).[1]

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[1] Although it is irrelevant whether the Petitioner was "unarrested," it is significant to note for the purpose of demonstrating direct conflict that the district court's implication that the Petitioner was subjected to different "procedures" than the Williams defendant following his arrest is belied by the face of its own opinion. Specifically, the district court's decision clearly states that the Petitioner was arrested, released pursuant to an assistance agreement, and subsequently re-

Further, the direct and express conflict between the district court's decision and Williams is not reconciled by the district court's explanation that the Fifth District did not "decide" Fla. R. Crim. P. 3.191(j)(2) when it granted speedy trial relief to the Williams defendant. This is demonstrated by Fla. R. Crim. P. 3.191(p)(1), which provides that "no remedy shall be granted to any defendant under this rule until the court has made the required inquiry under subsection (j)." As the foregoing passage clearly indicates, rule 3.191(p)(1) required the Fifth District to consider whether any of the exceptions listed in rule 3.191(j) were applicable prior to granting relief, including the exception contained in subsection (j)(2) involving delays attributable to the accused. Thus, while the Fifth District never specifically discussed subsection (j)(2) in its opinion, it nevertheless "decided" that a substantial assistance agreement which contemplates a delay in the filing of charges does not constitute a delay attributable to the accused pursuant to rule 3.191(j)(2) when it granted the Williams defendant discharge under the rule.[2]

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arrested for the same offense following the completion of assistance. While the parties below did not use the artificial label "unarrest" to describe the Petitioner's initial release from custody, it is clear from the four corners of both opinions that the events surrounding the Petitioner initial arrest and release are indistinguishable from what occurred in Williams.

[2] As early as 1980, rule 3.191 has **automatically required** courts to determine whether the delay "is attributable to the accused" prior to granting speedy trial relief. See Fla. R. Crim. P. 3.191(d)(3) (1980).

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the petitioner's argument.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Robert R. Wheeler, Assistant Attorney General, by hand delivery to Pl-01, The Capitol, Tallahassee, Florida, on December 23, 2003.

Respectfully submitted,

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Matthew K. Foster, Esquire
Florida Bar NO.: 0007927
Edward T. Bauer, Esquire
Florida Bar NO.: 0294690
Brooks, LeBoeuf, Bennett, & Foster, P.A.
909 East Park Avenue
Tallahassee, Florida 32301
Telephone No.: (850) 222-2000
Attorneys for Petitioner

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is proportionally spaced 14 point Times New Roman.

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Edward T. Bauer, Esq.