IN THE SUPREME COURT OF FLORIDA

BRANDON P. PELKY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO.: SC03-2217

Lower Tribunal No.: 1D02-5004

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

For purposes of this Reply Brief, Petitioner, Brandon P. Pelky, will be referred to as "Petitioner." Respondent, the State of Florida, will be referred to as "the State." The record on appeal consists of one volume, which will be referenced according to the letter "R", followed by the appropriate page number. The transcript of the motion hearing before the trial court will be referenced by the letter "T", followed by the appropriate page number.

ARGUMENT IN REPLY

AUTOMATIC DISCHARGE IS REQUIRED WHERE A DEFENDANT IS ARRESTED, IMMEDIATELY RELEASED PURSUANT TO A SUBSTANTIAL ASSISTANCE AGREEMENT THAT DOES NOT CONTAIN A WAIVER OF SPEEDY TRIAL, AND SUBSEQUENTLY REARRESTED AND CHARGED BY INFORMATION MORE THAN 175 DAYS AFTER THE INITIAL ARREST.

A. Introduction

In its answer brief, the State presents several arguments in support of its contention that the decision of the First District Court of Appeal should be approved. Specifically, the State argues that: (1) the First District's decision in

Bulgin is not inconsistent with the Fifth District's opinion in Williams v. State, 757 So. 2d 597 (Fla. 5th DCA 2000), and therefore this Court improvidently granted jurisdiction; (2) the First District correctly concluded that the failure to hold trial was attributable to the Petitioner because the Petitioner "defeated" the State's ability to file timely charges by entering into the assistance agreement; and (3) a waiver of speedy trial should not have been obtained by law enforcement as part of the assistance agreement because Rule 3.191 is "equipped to address speedy-trial situations" that would arise from such agreements. The Petitioner respectfully disagrees with each of these contentions.

B. Jurisdiction

As noted above, the State asserts in its answer brief that the decision of the First District below and the Fifth District's decision in Williams v. State, 757 So. 2d 597 (Fla. 5th DCA 2000), are not in conflict and therefore this Court should reconsider its decision to accept jurisdiction. (AB 5-6, 19). In support of this contention, the State points out that unlike Williams, no "unarrest" was attempted in the instant case, and further argues that the exception under the speedy trial rule upon which the First District based its ruling, Rule 3.191(j)(2), was not decided in Williams. (AB 6, 16, 19). Both arguments are without merit and are discussed separately below.

The State continues to assert, as it did below, that a "key material factual distinction" between the instant case and the Fifth District's decision in Williams is that the Petitioner was not subjected to an "unarrest." (AB 16). In response, the Petitioner would note that while the parties below did not use the term "unarrest" to describe the Petitioner's initial release, it is clear that the circumstances surrounding the release from custody of the Petitioner and the Williams defendant are identical. First, both the Petitioner and the Williams defendant were handcuffed and taken into custody for drug offenses. (R 2); Williams, 757 So. 2d at 598-99. In addition, the Petitioner and the defendant in Williams were immediately released from custody without being booked pursuant to an agreement to assist law enforcement. (T 4); Williams, 757 So. 2d at 599-600. Further, the assistance agreements in both cases, which did not contain waivers of speedy trial, contemplated that booking and the filing of formal charges would occur at a later date. (T 4-5); Williams, 757 So. 2d at 599-600. Finally, after the expiration of speedy trial, both defendants were rearrested following the completion of their assistance, at which point court proceedings were scheduled for the first time. (T 5); Williams, 757 So. 2d at 598, 600.

As a final matter, the Petitioner would point out that the term "unarrest" originated with the assistant state attorney prosecuting the Williams defendant,

and was merely used as a shorthand description of the defendant's initial release from custody in that case. Williams, 757 So. 2d at 598. In addition, it is important to note that the concept of an "unarrest" was specifically rejected by the Williams court, which held that "for the purposes of the speedy trial rule . . . **there is no such thing as an unarrest**." Id. at 598 (emphasis added). Thus, as the term "unarrest" has no legal significance, it is difficult to understand why the State considers it a "key material factual distinction" that the term was not used by the parties during the proceedings below.

In further support of its contention that Bulgin and Williams are not in conflict, the State argues that the exception contained in Rule 3.191(j)(2) was not addressed by the Fifth District in Williams. While it is true that the Fifth District did not specifically reference Rule 3.191(j)(2) in its opinion, the State is incorrect in suggesting that the Fifth District did not address the applicability of the Rule 3.191(j)(2) exception. This is demonstrated by Rule 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)." Thus, before the Fifth District in Williams could reverse the lower court and direct the defendant's discharge, Rule 3.191(p)(1) automatically required the court to consider whether **any** of the exceptions contained in Rule 3.191(j) should preclude discharge, including the (j)(2)

exception. Accordingly, by ordering the defendant's discharge, the Williams court necessarily decided that the defendant's entry into a substantial assistance agreement that contemplates a delay in the filing of charges does not implicate the Rule 3.191(j)(2) exception.

Based on the foregoing, there is no question that the First District's decision below and the Fifth District's decision in Williams are in conflict. The Williams decision plainly holds that automatic discharge should be granted 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 assistance is complete. Williams, 757 So. 2d 598-600. In contrast, the First District in Bulgin held identical factual circumstances that where a substantial assistance agreement contemplates a delay in the filing of charges, discharge is not an appropriate remedy. Bulgin, 858 So. 2d at 1097. As the First and Fifth Districts reached opposite conclusions when faced with identical facts, this Court appropriately exercised its discretion to review the decision below.

C. Rule 3.191(j)(2)

The State also contends in its answer brief that the First District correctly held that the failure to hold trial was attributable to the Petitioner, and thus the

Petitioner was not entitled to discharge. A careful reading of the First District's opinion reveals that the court attributed the delay to the Petitioner, at least in part, due to its erroneous conclusion that the agreement "satisfied [Petitioner's] concern that formal charges and court appearances would jeopardize [his] covert assistance." State v. Bulgin, 858 So. 2d at 1096, 1097 (Fla. 1st DCA 2003). As discussed in the Petitioner's initial brief, (IB 17-19), the only possible basis in the record for the First District's conclusion that the agreement satisfied a "concern" of the Petitioner was an affidavit prepared by Investigator Odom, (R 24-25), **the contents of which were disputed by the Petitioner and not resolved by the trial court**. (T 3-6, 14).

To its credit, the State makes no attempt in its answer brief to support the First District's incorrect conclusion that the assistance agreement satisfied a concern of the Petitioner regarding the timing of the charges. The State does argue, however, that the Rule 3.191(j)(2) exception should preclude the Petitioner's discharge because the "**Petitioner defeated** the State's opportunity to charge him" by entering into a substantial assistance agreement which contemplated a delay in the filing of charges until assistance is complete. (AB 14) (emphasis added). With due respect to the State, this is a curious assertion in light of the following: (1) the State had exclusive control over when a rearrest, booking, and the filing of charges

would occur; (2) the State suggested the assistance agreement and its terms; and (3) due to an oversight, the law enforcement officers neglected to obtain a wavier of speedy trial as part of the assistance agreement. (T 4-5; R 58).[1]

Based on the fact that the State exclusively possessed the power to ensure that a waiver of speedy trial was obtained or that charges were filed within 175 days, it is strange that the State would compare the instant case to Collins v. State, 489 So. 2d 133 (Fla. 1st DCA 1986), as well as State v. Rosenfeld, 467 So. 2d 731 (Fla. 3d DCA 1985), particularly since both decisions involved situations where the State had no power whatsoever to prevent the defendants from taking the action that resulted in the failure to hold trial. Specifically, the State in Collins had no ability to prevent the Defendant from reneging on his previously announced intention of entering a change of plea to no contest. Collins, 489 So. 2d at 133. Likewise, the State in Rosenfeld had no ability to prevent the trial court from allowing the defendant to withdraw his plea following the expiration of the speedy trial period. Rosenfeld, 467 So. 2d at 732. In the instant case, however, there was nothing preventing the State from rearresting the Petitioner within 175 days of his initial arrest and filing an information.

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[1] The State concedes in its answer brief that these points are "generally true." (AB 14).

In arguing that the failure to hold trial was attributable to the Petitioner, the State further contends that "if the basic speedy-trial period had expired, Petitioner could have simply filed a notice of expiration under Rule 3.191(p)." (AB 15). In response, the Petitioner would note that as a practical matter, it is quite impossible to file a notice of expiration of speedy trial when a defendant has not been booked, the clerk of court has no record of the case, there is no court file or case number, and no arrest paperwork has been filed with the court. As Judge Sharp noted in her concurring opinion in Williams, Rule 3.191(p) simply does not work when the court process has not been initiated. Williams v. State, 757 So. 2d 597, 601 (Fla. 5th DCA 2000) (Sharp, J., concurring). Accordingly, the State is incorrect in asserting that the Petitioner could have filed a notice of expiration of speedy trial to prevent further delay.

D. Speedy Trial Waiver

Finally, the State criticizes the Fifth District's statement in Williams that speedy trial concerns can be resolved with a waiver as part of the substantial assistance agreement. Specifically, the State contends that such an approach "unnecessarily requires the State to force a defendant to forego a substantial right in order to reap the benefits of an assistance agreement." (AB 17). The State also argues that written waivers of speedy trial in connection with substantial assistance

agreements are unnecessary, as Rule 3.191 is already "equipped to address speedy-trial situations" because a defendant can simply file a notice of expiration of speedy trial.

With respect to the first argument, the State expresses concern that obtaining a waiver of speedy trial as part of an assistance agreement would unfairly force a defendant to "forego a substantial right." The State's concern in this regard is difficult to understand, particularly since the State asserts repeatedly in its answer brief that the Petitioner is not entitled to the protection of the speedy trial simply because he entered into an assistance agreement. Notwithstanding the logical inconsistency of the State's argument, it is important to note that the Petitioner never suggested, nor did the Fifth District in Williams, that the State should be *required* to obtain waivers of speedy trial in all substantial assistance cases. Rather, both the Petitioner and the Williams court were merely pointing out that if the State wishes to utilize a cooperating defendant for an extended period of time (i.e., more than 175 days), it could simply obtain a waiver of speedy trial to avoid a speedy trial dilemma. If the State is genuinely concerned with a rule of law that would unfairly force defendants to forego a substantial right, then it can choose not to obtain waivers of speedy trial and instead ensure that cooperating defendants are

rearrested and charged within 175 days.[2]

The State also argues that obtaining waivers of speedy trial as part of assistance agreements is not the preferable approach because Rule 3.191 is equipped to address situations in which the period of assistance continues beyond the basic period set forth in Rule 3.191(a). (AB 17-19). Specifically, the State contends once again that any speedy trial concern can be remedied by the defendant filing a notice of expiration pursuant to Rule 3.191(p). As discussed above, however, the lack of court proceedings would make it impossible for a defendant to file a notice of expiration of speedy trial.

CONCLUSION

The Petitioner respectfully requests that this Court quash the decision of the First District below, and direct that the trial court's order of discharge be reinstated.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Robert R. Wheeler, Esq.,

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[2] The State cites no cases from any jurisdiction which hold that obtaining a waiver of speedy trial as part of an assistance agreement is unduly burdensome to the state or unfair to a defendant. As noted in the Petitioner's initial brief, however, at least one other jurisdiction has approved the use of waivers as part of speedy trial agreements. See State v. Delockroy, 559 N.W.2d 43, 47 (Iowa Ct. App. 1996) ("If law enforcement desire to utilize cooperation agreements after an arrest, and to delay the filing of charges pending completion of the agreement, a waiver of the speedy indictment rule can be requested as part of the cooperation agreement.")

and Thomas D. Winokur, Esq., by hand delivery to Pl-01, The Capitol, Tallahassee, Florida, on June 7, 2004.

Respectfully submitted,

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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.