IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JEFFREY LOVELACE,

Respondent.

Case No. SC05-1395
Lower Ct. No. 4D05-746

On Review of a Decision of the District Court of Appeal,
Fourth District

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Lovelace accepts the State's Statement of the Case and Facts as an accurate representation of the proceedings below pertinent to the issues before this Court.

The statute Lovelace was charged with violating in the information filed in the circuit court is Section 316.193(2)(b)1, Florida Statutes (2003). The State has referred to it by the session law pursuant to which it was adopted.

SUMMARY OF THE ARGUMENT

1. The decision of the district court does not conflict with that of *State v. Jackson,* 784 So.2d 1229 (Fla. 1st DCA 2001), *review denied,* 805 So.2d 807 (Fla. 2002). The determinative issue, as found by the *Jackson* court, was that on the filing of an information in circuit court *charging both felony and misdemeanor DUI,* the county court lost jurisdiction over the misdemeanor DUI charge pending there. In the case at bar the information filed in the circuit court charged *only* felony DUI. Since the circuit court never acquired jurisdiction over a misdemeanor DUI charge it could not have exclusive jurisdiction over it. Accordingly, the case at bar could not be resolved on the basis of the issue that was found to be determinative in *Jackson.* This case and *Jackson*, therefore, do not conflict and this Court lacks conflict jurisdiction.

2. The decision reached by the district court is mandated by this Court's decision in *State v. Woodruff*, 676 So.2d 975 (Fla. 1996). In *Woodruff* this Court held that a felony DUI conviction based on prior misdemeanor DUI convictions is precluded when a conviction on the underlying misdemeanor DUI is barred by the speedy-trial rule. The germane facts of the case at bar are indistinguishable from those of *Woodruff*. A misdemeanor DUI charge remained pending in county court when charges were filed in circuit court, and that misdemeanor charge became barred by the failure to afford the defendant a speedy trial. The misdemeanor charge having become barred, the felony prosecution was precluded. The "no information" filed by the State in the county court was not the equivalent of a *nol pros*, and in any event a *nol pros* would not have precluded the running of the speedy-trial period. To avoid the running of the speedy-trial period the State should have consolidated felony and misdemeanor charges in circuit court.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT IN THIS CASE DOES NOT CONFLICT WITH *STATE V. JACKSON* AND THIS COURT ACCORDINGLY LACKS JURISDICTION.

The district court's certification of conflict was based on the premise that its decision conflicts with that of the First District in *State v. Jackson*, 784 So.2d 1229 (Fla. 1st DCA 2001), *review denied*, 805 So.2d 807 (Fla. 2002). The case at bar differs significantly from *Jackson*. This distinction compels a conclusion that the decisions are not in conflict and that this Court accordingly lacks jurisdiction. A dispositive distinction is that in *Jackson* the information filed in the circuit court charged both misdemeanor and felony DUI whereas in the instant case the circuit court information charged only felony DUI.

In *Jackson* the defendant initially was charged with misdemeanor DUI in county court. He had been arrested on October 21, 1999. On January 10, 2000, the State *nol-prossed* the county-court charges. The defendant gave notice of the expiration of the speedy-trial period and moved for discharge on January 25, 2000, which was 96 days after the defendant's arrest. On February 3, 2000, prior to the county court's ruling on the motion for discharge, the State filed an information in circuit court charging the defendant with his fourth misdemeanor DUI offense as

well as felony DUI based on a fourth DUI. Subsequently, the county court granted the defendant's motion for discharge. Then the defendant moved to dismiss the charges in circuit court, relying on *State v. Woodruff*, 676 So.2d 975 (Fla. 1996). The circuit court granted the motion and the State appealed.

The case at bar has a significantly different procedural history. In its opinion the Fourth District described the history of the instant case as follows:

> Defendant was arrested and issued a citation for misdemeanor DUI on August 11, 2004. A few days after the ninety day speedy trial period expired, defendant filed a notice of expiration of speedy trial time on November 15, 2004, in county court. The state then filed a "no information" on November 19, 2004. Defendant was not brought to trial and moved for discharge on November 30, 2004, which was the end of the fifteen day recapture period.
>
> The next day, on December 1, 2004, the state filed a felony DUI charge in circuit court based on the same incident and prior DUI convictions. *See* § 316.193(2)(b)1, Fla. Stat. (2004). The county court in which the misdemeanor charge had been pending held a hearing on defendant's motion for discharge on December 6, 2004 and concluded it had no jurisdiction to grant the motion because of the "no information" filed by the state.
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> . . . .
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> After the county court concluded it had no jurisdiction to grant the motion for discharge, defendant filed a motion for discharge in circuit court, where the felony information was pending, which was denied. His motion was based on *State v. Woodruff*, 676 So.2d 975 (Fla.1996), in which it was held that the discharge of a

> misdemeanor DUI in county court based on the speedy trial rule would preclude a felony prosecution based on the same incident and prior DUI convictions. …

Lovelace v. State, 906 So.2d 1258, 1259 (Fla. 4th DCA 2005). The circuit court denied the motion for discharge.

In *Jackson*, *supra*, the district court reversed the circuit court, reasoning:

> The case at bar is different from *Woodruff* because in this case, the State filed a nolle prosequi in county court and refiled the misdemeanor charge in circuit court. Because the State filed new charges in circuit court after its nolle prosequi in county court, the circuit court obtained exclusive jurisdiction pursuant to section 26.012(2)(d), Florida Statutes (circuit courts "shall have exclusive original jurisdiction: Of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged;"); *Ledlow v. State*, 743 So.2d 165 (Fla. 4th DCA 1999)(circuit court had subject matter jurisdiction over felony and misdemeanor, quoting § 26.012(2)(d), Fla. Stat.); *State v. R.J.*, 763 So.2d 370, 371 (Fla. 4th DCA 1998)("Everything which occurs in a proceeding subsequent to the filing of a nolle prosse by the state is a nullity."); *State v. Spence*, 658 So.2d 660, 661 (Fla. 3d DCA 1995)("Upon the state's announcement of a nol pros of the information, which was self-executing, the case was effectively nullified and the proceeding terminated."). The discharge by the county court is of no effect because the county court lost jurisdiction. Accordingly, there is no estoppel to the misdemeanor DUI charge brought in circuit court as was the case in *Woodruff*.

784 So.2d at 1231.

In *Jackson* it was the circuit court's acquisition of jurisdiction *over the misdemeanor charge* that, according to the district court, deprived the county court of jurisdiction in the case. Thus, reasoned the court, the county court's order of discharge was a nullity in the absence of jurisdiction and the misdemeanor remained alive in the circuit court.

In the case at bar, unlike in *Jackson*, the State did not file a misdemeanor charge in conjunction with the felony charge in circuit court. The only charge in the information filed in circuit court was for felony DUI. Nor did the State move to consolidate the county and circuit-court charges. *Cf. Woodruff, supra* 676 So.2d at 977 n.2. Thus, the basis that the *Jackson* court saw for ousting the county court of jurisdiction — that the circuit court had acquired exclusive jurisdiction over the misdemeanor charge(s) — is totally lacking here. Regardless of whether *Jackson* was correctly decided, it involved a different issue than that which is determinative in the case at bar. It accordingly does not conflict with *Lovelace*, with the result that this Court lacks conflict jurisdiction.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FELONY DUI PROSECUTION WAS BARRED AND THE CIRCUIT COURT SHOULD HAVE DISCHARGED THE DEFENDANT.

This issue involves a question of law arising from undisputed facts. The standard of review accordingly is de novo. *Global Travel Mktg., Inc. v. Shea,* 908 So.2d 392, 396 (Fla. 2005).

The decision of the district court is consistent with and indeed mandated by this Court's decision in *State v. Woodruff,* 676 So.2d 975 (Fla. 1996). This case is indistinguishable from *Woodruff* in regard to the critical issues. The germane facts in regard to both cases are that viable misdemeanor DUI charges remained pending in the county court when an information was filed in the circuit court, and that those county-court charges became barred by the speedy-trial rule. Because of the language of the particular statute involved, a felony DUI conviction could not be obtained without a concurrent misdemeanor DUI conviction.

In *Woodruff* the defendant was charged with five driving misdemeanors, including DUI offenses, by uniform traffic citation. A month later the State filed an information in circuit court charging the defendant with felony and misdemeanor DUI. After the expiration of 90 days from his arrest the defendant filed a notice of

expiration. After he filed a motion for discharge the state *nol-prossed* the county-court citations.

In the instant case Lovelace was charged by uniform traffic citation in county court with misdemeanor DUI. More than 90 days after his arrest he filed a notice of expiration in the county court. Seven days later the State filed a "no information" in the county court. When the 15-day speedy-trial window had expired, Lovelace filed a motion for discharge. The following day the State filed an information in circuit court charging him with felony DUI.

The proceedings in the county court raise the issue of the effect of the State filing a "no information." In its brief the State casts its argument under the premise that a "no information" is equivalent to a *nol pros*. This is a false premise. A *nol pros* (or *nolle prosequi*) is a procedure that is derived from the common law and operates to terminate a criminal case where the defendant has already been charged. *See, Wilson v. Renfroe,* 91 So.2d 857, 859 (Fla. 1957). A "no information," however, does not terminate charges where a charging document has already been filed with the court. *Purchase v. State,* 866 So.2d 208 (Fla. 3d DCA 2004). In the instant case, where a criminal charge by uniform traffic citation was

pending when the "no information" was filed, the misdemeanor charge was not affected by the "no information." The filing of an information was not necessary for the prosecution to proceed. Rule 6.165(a) of the Florida Rules of Traffic Court provides that criminal traffic offenses may be prosecuted by uniform traffic citation rather than indictment or information. Jurisdiction over the misdemeanor charge continued in the county court.

Even if the "no information" were the equivalent of a *nol pros* for purposes of this case, the county court nevertheless would have continued to have jurisdiction to enter an order of discharge. In *Woodruff* the State *nol-prossed* the traffic citations the day after the defendant filed his motion for discharge. Although the opinions of this Court and the district court in *Woodruff* do not reveal the date the county court's order of discharge was entered, it almost certainly was after the State had *nol-prossed* the traffic citations. This would indicate that the *nol pros* did not deprive the county court of jurisdiction.

State v. Jackson, supra, cannot be reconciled with *Woodruff* in this regard. The *Jackson* court concluded that the filing in circuit court of an information charging both felony and misdemeanor DUI deprived the county court of jurisdiction over the misdemeanor charge. Yet the filing of an information in

circuit court charging both felony and misdemeanor DUI is precisely what occurred in *Woodruff*. This Court in *Woodruff* concluded that the county court's order of discharge was effective. This was an order entered after the information had been filed in the circuit court. The county court would have been deprived of jurisdiction in both *Jackson* and *Woodruff* if the State had moved in those cases to consolidate the county and circuit-court charges. *Woodruff*, *supra* 676 So.2d at 977 n.2. But there was no motion to consolidate in *Jackson*. Accordingly, it is inconsistent with *Woodruff*.

In this case the Fourth District correctly observed this flaw in *Jackson*, stating:

> The *Jackson* panel pointed out that, under rule 3.191(f), when a felony and misdemeanor are consolidated for trial in circuit court, the longer felony speedy trial applies to the misdemeanor charge. That rule, however, was not applicable in *Jackson*, because the misdemeanor charge was pending in county court, and not consolidated with a felony information pending in circuit court. The state's reliance on rule 3.191(f) in the present case is misplaced for the same reason.

906 So.2d at 1260.

The State attempts to distinguish *State v. Agee*, 622 So.2d 473 (Fla. 1993). It confuses the impact of the speedy-trial rule on the misdemeanor DUI charge with

that on the felony DUI charge. Lovelace has not contended, and the district court did not hold, that the felony DUI charge was barred by the speedy-trial rule. The district court correctly concluded that the felony DUI prosecution was precluded because prosecution of the misdemeanor DUI charge was barred under the speedy-trial rule.

In concluding its argument the State raised some issues that are nothing more than red herrings. The State contends that if the ruling below is allowed to stand a felony DUI charge will be subject to a 90-day speedy-trial rule. (Petitioner's Brief at 14). This is obviously not true as the possibilities in this very case demonstrate. One such possibility is that the State could have filed the felony charge in circuit court before the expiration of the speedy-trial period and moved to consolidate the felony and misdemeanor charges. *Woodruff* states in the most unambiguous terms that this is an appropriate course to take in such situations. 676 So.2d at 977 n.2. Contrary to the State's contention, this would not result in a 90-day speedy trial period for the felony count, but would result in a 175-day period for both the felony and misdemeanor. Another option would have been for the State to seek an extension of the speedy-trial period if the facts warranted. *State v. Agee, supra* 622 So.2d at 475; FLA. R. CRIM. P. 3.191(f).

The State concludes that Lovelace had no substantial right violated and that his argument is "novel." His right to a speedy trial has been violated and the decisions of this Court demonstrate that the right is in fact substantial. The argument is not novel to those familiar with *Woodruff*.

CONCLUSION

The Court should determine that the decision of the district court does not conflict with that in *State v. Jackson* and that the Court accordingly lacks conflict jurisdiction. If the Court determines that it has jurisdiction, it should affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies hereof have been furnished to Laura Fisher Zibura, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, FL 33401-3432, Michael J. Satz, Esquire, State Attorney's Office, 201 Southeast Sixth Street, Room 730, Fort Lauderdale, Florida 33301, and to the Hon. John J. Murphy, III, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, FL 33301, by mail on September ____, 2005.

_____
Charles D. Barnard

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Respondent's Answer Brief is submitted in Times New Roman 14-point font and complies with the font requirements of Rule 9.100(*l*), Florida Rules of Appellate Procedure.

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Charles D. Barnard