IN THE SUPREME COURT OF FLORIDA
(Lower Court Case No.: 4D05-746)

CASE NO. SC05-1395

STATE OF FLORIDA,

Petitioner,

vs.

JEFFREY LOVELACE,

Respondent.

****

PETITIONER=S INITIAL BRIEF ON THE MERITS

On review from the
District Court of Appeal, Fourth District

****

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PRELIMINARY STATEMENT

The Petitioner was the Prosecution and Respondent was the Defendant in the

Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

This is case is before this Court on discretionary review of an opinion issued by the Fourth District Court of Appeals, Lovelace v. State, 906 So. 2d 1258 (Fla. 4th DCA 2005). The Fourth District certified direct conflict with the First District=s opinion State v. Jackson, 784 So. 2d 1229 (Appendix A).

Respondent, Jeffrey Lovelace, was arrested on August 11, 2004 and given a traffic citation for Misdemeanor DUI. On November 12, 2004, ninety three (93) days after the arrest, Defendant/Respondent (hereinafter referred to as ARespondent@) filed a notice in County Court of the expiration of the speedy trial period. (Appendix B).

Seven days later, on November 19, 2004, the State filed a Ano information@ in County Court for the Misdemeanor DUI. On November 30, 2004, Respondent filed a Motion to Discharge in County Court, arguing that the charges should be dismissed because the speedy trial time period had run. (Appendix B).

On December 1, 2004, Petitioner filed an information in Circuit Court charging Respondent with felony DUI under Chapter 2002-263 (2002) which states:

> any person who is convicted of a third violation of this section for an offense that occurs within ten years after a prior conviction for a violation of this section commits a felony in the third degree . . .

(Appendix C).

On December 6, 2004, the County Court Judge issued an Order on Respondent=s Motion to Discharge, finding that it lacked jurisdiction to consider the motion because the

State had filed a Ano information@ on November 19, 2004, notifying the County Court that it would not be filing misdemeanor charges. (Appendix C).

On December 28, 2004, Respondent moved to discharge in Circuit Court, alleging a violation of the speedy trial rule. On January 31, 2005, Petitioner filed a Response opposing the Motion for Discharge. (Appendix C).

On February 16, 2005, the Circuit Court issued an Order denying Defendant=s Motion to Dismiss. (Appendix C).

On February 22, 2005, Defendant filed a Petition for Writ of Prohibition asking the Fourth District Court of Appeal to issue an Order prohibiting the Circuit Court from proceeding with the prosecution. (Appendix B). The State issued its Response on March 14, 2005. (Appendix C). Defendant filed a Reply on March 24, 2005 (Appendix D).

On June 1, 2005, the Fourth District Court of Appeals issued an Opinion finding that the county court should have granted defendant=s motion for discharge of the misdemeanor DUI based on the expiration of the speedy trial period. The District Court certified conflict with State v. Jackson, 784 So. 2d 1229 (Fla. 1st DCA 2001. (Appendix E).

The State moved for re-hearing on June 15, 2005 (Appendix F) and Defendant filed a Response. (Appendix G). On July 27, 2005, the Court withdrew its previous opinion and replaced it with the subject opinion. (Appendix A). However, the Court=s reasoning and decision remained the same as the original opinion and the Court again

certified direct conflict with State v. Jackson, 784 So. 2d 1229 (Fla. 1st DCA 2001).

Petitioner filed a notice to invoke discretionary jurisdiction. This Court postponed its decision on jurisdiction and issued a briefing schedule.

SUMMARY OF THE ARGUMENT

THE CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT IN THE INSTANT CASE AND THE FIRST DISTRICT IN STATE V. JACKSON SHOULD BE RESOLVED IN FAVOR OF JACKSON.

In Lovelace v. State, 906 So. 2d 1258 (Fla. 4th DCA 2005), the Fourth District Court of Appeals addressed the question of whether a violation of the speedy trial rule for a misdemeanor DUI charge precludes a felony DUI charge based on the same incident and prior DUI convictions. Citing to this Court=s decision in State v. Agee, 622 So. 2d 473 (Fla. 1993) and Fla. R. Crim. P. 3.191(o), the Fourth District held that the county court should have granted Lovelace=s motion for discharge based on an expiration of the speedy trial period, certifying direct conflict with State v. Jackson, 784 So. 2d 1229 (Fla. 1st DCA 2001) *rev= denied,* 805 So. 2d 807(Fla. 2002). Petitioner argues that the conflict between the Fourth District in the instant case and the First District in Jackson should be resolved in favor of Jackson, a case with a substantially similar facts to the case at bar. Petitioner further argues that the Fourth District=s reliance on Agee and 3.191(o) for its holding that the State violated the speedy trial rule was error and should be quashed.

ARGUMENT

THE CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT IN THE INSTANT CASE AND THE FIRST DISTRICT IN STATE V. JACKSON SHOULD BE RESOLVED IN FAVOR OF JACKSON.

Jurisdiction

In Lovelace v. State, 906 So. 2d 1258 (Fla. 4th DCA 2005)[1], the Fourth District Court of Appeals addressed the question of whether a violation of the speedy trial rule for a misdemeanor DUI charge precludes a felony DUI charge based on the same incident and prior DUI convictions. Citing to this Court=s decision in State v. Agee, 622 So. 2d 473 (Fla. 1993) and Fla. R. Crim. P. 3.191(o), the District Court held that the county court should have granted Lovelace=s motion for discharge based on an expiration of the speedy trial period, certifying direct conflict with State v. Jackson, 784 So. 2d 1229 (Fla. 1st DCA 2001) *rev= denied* 805 So. 2d 807(Fla. 2002). The Petitioner moved to invoke discretionary jurisdiction. This Court reserved ruling on jurisdiction, and imposed a briefing schedule.

Standard of Review

AA trial court=s ruling on a motion to dismiss based on a question of law is subject to de novo review.@ Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd., 752 So.2d 582, 584 (Fla. 2000).

[1]After the Fourth District issued its opinion on June 1, 2005, the State filed a motion for rehearing. The Fourth then substituted that opinion with the opinion on review here.

Petitioner argues that the conflict between the decision of the Fourth District in the instant case and the First District in Jackson should be resolved in favor of Jackson. Petitioner further argues that the Fourth District=s reliance on Agee and 3.191(o) for its holding that the State violated the speedy trial rule was error and should be quashed.

Under Fla. R. of Criminal Procedure 3.191(a), the State is required to bring misdemeanors to trial within 90 days and felonies within 175 days. The crime of DUI under ' 316.193(1), Fla. Stat. (2004), is a first-degree misdemeanor. Therefore, the speedy trial period for misdemeanor DUI expires 90 days after the defendant is arrested. However, a third or subsequent DUI conviction is a third-degree felony. ' 316.193(2)(b), Fla. Stat. (2004). As such, the speedy trial period for a violation under ' 316.191(2)(b) expires 175 days after the defendant is arrested.

The following is a summary of relevant facts contained in the Fourth District=s opinion in Lovelace:

> 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 Ano 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 Section 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 Ano information@ filed by the state.
>
> * * *
>
> 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. * * *

Id.

(Appendix A).

The Fourth District Court concluded that under State v. Agee, 622 So. 2d 473,475 (Fla. 1993) and Fla. R. Crim. P. 3.191(o), that the county court should have granted defendant=s motion for discharge of the misdemeanor DUI based on the expiration of the speedy trial period. Id. Citing to State v. Woodruff, 676 So. 2d 975 (Fla. 1996), the Fourth District stated that the discharge of the county court misdemeanor precludes the state=s prosecution for felony DUI as it requires a conviction of the misdemeanor charge and two prior DUI convictions. Id.

The state argued below, that the 175 felony speedy trial period should have applied to the instant case, relying on the reasoning of State v. Jackson. Id. Although the Fourth District rejected this argument, it certified direct conflict with Jackson.

Petitioner argues that the District Court erred when it rejected the holding in Jackson, a case addressing a nearly identical speedy trial issue with substantially similar facts as the case at bar. In Jackson, the state entered a nolle prosse in county court for

the misdemeanor DUI charges prior to the expiration of the 90 day speedy trial period. Defendant filed a notice of expiration of speedy trial in county court 96 days after the expiration of the speedy trial period. Id. The State then filed felony DUI charges. Id. The First District held that because the felony DUI charge was filed well before the speedy trial deadline for felonies, the charges did not violate the speedy trial rule. Id. The Jackson Court reasoned that because the state nolle prosequi the county court charges, the circuit court obtained exclusive jurisdiction pursuant to ' 26.12(2)(d), which states that the circuit court shall have exclusive original jurisdiction of all felonies and all misdemeanors arising of the same circumstances as a felony which is also charged. Id. *citing to* Ledlow v. State, 743 So. 2d 165 (Fla. 4th DCA 1999). In support of this conclusion, the Jackson Court included the following language from this Court=s Woodruff opinion:

> [t]he speedy trial rule does not bar prosecution of greater degree crimes because defendants charged with misdemeanors Aought to be in no better position . . than [they] would have been had [the misdemeanors] not been filed insofar as the time within which [the defendants] must be brought to trial on the felony charge [s] is concerned.@

Id. at 1230.

Like Jackson, the analysis of the instant case begins with an arrest for misdemeanor DUI. As stated in the factual summary above, Respondent filed a notice of expiration of speedy trial. The state then filed a Ano information@ in county court. The State, upon learning of two prior DUI convictions, filed a felony information in circuit

court. The information was filed well before the expiration of the felony speedy trial limit. Applying the reasoning of Jackson, the circuit court held that the county court lost jurisdiction and therefore could not grant a motion for discharge. This Court has held that although a nolle prosequi does not toll the running of the speedy trial period, charges may be re-filed if the speedy trial period has not run. Williams v. State, 622 So. 2d 477 (Fla. 1993). Because the felony information was filed well before the expiration of the 175 day felony speedy trial period, no speedy trial violation occurred in this case.

The Fourth District=s reliance on this Court=s holding in State v. Agee, 622 So. 2d 473 (Fla. 1993) is misplaced, as there are substantial factual differences between Agee and the instant case. The Fourth District stated that it was unable to reconcile the holding in Jackson that after the state nolle prossed the misdemeanor DUI in county court, the county court no longer had jurisdiction to grant the motion for discharge based on a violation of the speedy trial rule, with Agee, which holds that when a state enters a nol pros, the speedy trial period continues to run and the State may not re-file charges based on the same conduct **after the period has expired**. (Emphasis added).

In Agee, the new information was filed well after the expiration of the 175 felony speedy trial period. Agee was charged with attempted second degree murder for shooting the victim, who was shot and rendered comatose. Id. at 474. Thirty three days prior to the expiration of the speedy trial period, the State filed a nolle prosequi, noting that the victim was in a coma and there were no witnesses. Id. Long after the original 175

speedy trial period had run, the State filed an information for attempted first degree murder, after the victim emerged from his coma and witnesses were located. Id. This Court held that when the state enters a nolle prosse, the speedy trial period continues to run and the state may not file new charges based on the same conduct. Id. at 475.

Thus, two very critical factual distinctions make the holding of Agee inapplicable to this case. First, the state in this case, did not **re-file** the misdemeanor DUI charge, it **filed** a felony DUI charge **after** it filed a Ano information@ in county court of the misdemeanor DUI. Second, the felony information in the instant case was filed well before the expiration of the 175 felony speedy trial period.

The Fourth District also stated that it could not reconcile the language of Fla. R.Crim. P. 3.191(o), which states that the speedy trial rule shall not be avoided by filing a nolle prosse and then prosecuting a new crime based on the same conduct, with the Jackson holding. Petitioner argues that because misdemeanor DUI and felony DUI are not the same crime, this rule does not apply to the instant case. In Agee, defendant was originally charged with attempted second degree murder and then charged with attempted first degree murder, after the victim recovered and the state located witnesses. Since Agee was charged with different degrees of the same crime, 3.191(o) applied. Here, defendant was charged first with misdeamor DUI and second, with felony DUI. This Court in State v. Woodruff, 676 So. 2d 975 (Fla. 1996), explained that misdemeanor DUI and felony DUI are not the same crime:

> [E]stoppel did not attach to the felony DUI offense charged in the information because felony DUI is not the same offense as any of the misdemeanor ticket offenses. We reject the district court of appeal=s determination that the only difference between the two offenses is the severity of punishment. Felony DUI requires proof of an additional element that misdemeanor DUI does not: the existence of three or more prior misdemeanor DUI convictions. **Felony DUI is therefore a completely separate offense from misdemeanor DUI, not simply a penalty enhancement.** Consequently, the principle of estoppel did not work to bar prosecution of the felony DUI offense. (citations omitted).

Id. (Emphasis added).

Petitioner does not argue that the nolle prosequi tolls the speedy trial period. See Fla.R.Crim.P. 3.191(o). After 90 days from the date of arrest had elapsed, the state would have been prohibited from re-filing the **misdemeanor** DUI offense. This is not the case here. The State filed a **felony** information against Defendant, charging him with felony DUI, an offense that the Woodruff Court calls a Acompletely separate offense,@ and was therefore subject to the felony speedy trial rule, which had not yet run. Therefore, because misdemeanor DUI and felony DUI are not the same crime, the Fourth District=s reliance on 3.191(o), is error, as the state did not re-file charges based on the same conduct.

Further, the Fourth District=s reliance on Woodruff, for the holding that the discharge of the misdemeanor in county court would preclude a felony prosecution based on the same incident and prior DUI convictions, is also misplaced. Here, the State filed

a valid Ano information@ on the county court misdemeanor. In Woodruff, the nolle prosequi entered by the State was invalid and as a result did not deprive the county court of jurisdiction. This is explained in the district court opinion under review in Woodruff. The District Court in State v. Woodruff, 654 So.2d 585, 587 (Fla. 3d DCA 1995), held that the state=s nolle prosequi of the misdemeanor tickets was a nullity because it was not filed within the Awindow period,@ provided for in 3.191(p), which requires defendant to file a notice of expiration of speedy trial, requires the court to hold a hearing within five days and requires that defendant be brought to trial within 10 days of that hearing.

At bar, the State did take action. After defendant filed a notice of expiration of speedy trial, the state filed a valid Ano information,@ three days later, effectively ending the misdemeanor case. Therefore, Respondent=s subsequent motion for discharge was directed to a non-existent case and therefore a nullity, as the county court correctly found below.

It bears repeating that Petitioner is not arguing that the Ano information@ stopped the speedy trial clock. If the State had attempted to file a new **misdemeanor** case against Defendant after the nolle prosequi, it would have been subject to the original speedy trial period. This is not the case here. The State filed a **felony** information alleging a wholly different crime, and was subject to the longer felony speedy trial period which had not expired. The valid discharge of the misdemeanor DUI had no effect on the felony DUI charge, and the Fourth District erred in finding that it did.

This argument is supported by the holding in State v. Psomas, 766 So. 2d 1085 (Fla. 2d DCA 2000). Psomas is factually similar to the case at bar, except that in Psomas the state failed to enter a nolle prosequi in the county court case before it was discharged. The court upheld the action of the county court, which had ruled that Aabsent consolidation of the misdemeanor charge with the felony charge **or a nolle prosequi of the misdemeanor charge**, the misdemeanor case was still viable in county court@ and thus subject to discharge for violation of the speedy trial rule. Id. Psomas, suggests that if the State had entered a nolle prosequi of the misdemeanor case, the misdemeanor case would not have been Aviable@ and therefore not subject to discharge.

A felony DUI charge under ' 316.193(2)(b), often begins as a misdemeanor DUI, which is later filed as a felony DUI information after the defendant=s prior DUI convictions are discovered. If the ruling below is allowed to stand, a felony DUI charge will be subject to a 90-day speedy trial period, because the defendant may discharge the misdemeanor case after 90 days, even if the State has nol-prossed it, and then use that discharge to dismiss the felony case.

Respondent has already proven that he is undeterred by the sanctions imposed for his previous drunk driving convictions from continuing his reckless behavior. The effect of the Fourth District=s opinion is that serial drunk drivers can be discharged on the finest of technicalities, by imposing a de facto 90-day speedy trial period for serial DUI, of which most prosecutors are unaware and therefore may unwittingly violate.

In State v. Williams, 791 So. 2d 1088,1093 (Fla. 2001), in his Dissent, Justice Wells expressed his concern that this Court=s interpretation of the speedy trial has created a judicial statute of limitation without foundation in the language of the rule.

Petitioner argues that under the holding of the Fourth District below, the following scenario could occur: Defendant is arrested for DUI, and issued a misdemeanor DUI citation. A misdemeanor case is opened in county court. One week after the arrest, the State Attorney discovers that Defendant has two previous DUI convictions, announces a nolle prosequi of the misdemeanor case, and files a felony information. Ninety-five days after the arrest, Defendant moves for a discharge on the misdemeanor case because the speedy trial period has expired, even though there had been no action in county court since the State announced the nolle prosequi.

Under the reasoning of the court below, the county court would be free to discharge a defendant on the misdemeanor case, even though it had been nol-prossed shortly after it was filed. Moreover, the circuit court would be obligated to dismiss the felony case because the misdemeanor case had been discharged. In effect, the ruling of the court below mandates a 90-day misdemeanor speedy trial period for felony DUI, as long as there was any action in the county court prior to filing a felony information (a common occurrence). This absurd result is not contemplated by the felony DUI statute, the speedy trial rule, the Agee decision, or common sense.

This Court must recognize that the State violated no substantial right of the

Defendant in this case, and that his novel argument may grievously harm the State's compelling interest in keeping serial drunk drivers off our roads. State v. Agee does not apply to this case, and this Court should therefore reverse.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to QUASH the lower court=s decision and REMAND for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner=s Initial Brief on the Merits" has been furnished by Courier to: Charles D. Bernard, Counsel for Appellee 3940 North Andrews Avenue, Fort Lauderdale, Florida 33309, this _____ day of September, 2005.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certified that the instant brief has been prepared with 14 point Times New Roman, a font that is not proportionately spaced, this ____ day of September, 2005.

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