

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

ANDREW NELSON,
Respondent.

Case No. SC08-2325

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Respondent, Andrew Nelson, the Petitioner in the Fourth District Court of Appeals and the Defendant in the trial court will be referenced in this brief as the respondent or the defendant. Petitioner, the State of Florida, the Respondent in the Fourth District Court of Appeals and the prosecuting party in the trial court will be referenced in this brief as the petitioner, the prosecution, or the State.

STATEMENT OF THE CASE AND FACTS

On May 16, 2007, the respondent was arrested for one count of Armed Burglary of a Dwelling and a Carrying Concealed Weapon as a juvenile offender. The allegations were that the respondent broke into the victim's house and stole fourteen firearms. At the time of arrest, the police officer found two of the fourteen stolen firearms on the respondent. On or about June 6, 2007, the Office of the State Attorney filed a Petition for Delinquency, In the Interest of Andrew Nelson Case No. 07-4707DL, charging the respondent with one count of grand theft and one count of carrying a concealed firearm. Rule 8.090(a) of the Florida Rules of Juvenile Procedure provides speedy trial to be ninety days, which for this case expired on August 13, 2007. On August 15, 2007, the case was set for the first Calendar Call, not for trial. (Appendix). On that date, the respondent's counsel took a continuance in order to complete discovery. Furthermore, the trial court had not yet set a trial date for the case.

On November 9, 2007, the Office of the State Attorney direct filed the respondent as an adult, by filing an information on State vs. Andrew Nelson case no. 07-22153CF10A, in the Circuit Court for one count of Armed Burglary of a Dwelling and twelve counts of grand theft arising out of the same incident. The Petition for Delinquency in the Juvenile Case No. 07-4707DL was nolle prose and later also direct filed as well on December 6, 2007, under State vs. Andrew Nelson case no. 07-23487CF10A.

On or about March 6, 2008, the respondent's counsel filed a Notice of Expiration of Speedy Trial and Motion for Discharge. On March 7, 2007, the trial judge conducted a hearing on the Notice of Expiration of Speedy Trial. At the hearing, the Office of the State Attorney argued that the respondent had taken a continuance on August 15, 2007 and therefore waived speedy trial even though the continuance was taken after the natural speedy had expired.

The trial court denied the respondent's motion to discharge and signed an order to that effect that morning regarding case 07-22153CF10A. The respondent filed a Motion to Discharge on case no. 07-23487CF10A which was also denied by the trial court. Respondent then filed a Writ of Prohibition with the Court of Appeals which was granted. Nelson v. State, 993 So. 2d 1072(Fla. 4th DCA 2008). The Court of Appeals held that, "because his motion for continuance occurred after the speedy trial time period had already run, it did not have the effect of waiving his right to

discharge. As both of his adult cases were either filed or re-filed after the expiration of the adult speedy trial time period, we grant the petitions and order the defendant discharge.”

The petitioner filed a motion for rehearing which was denied by the Court of Appeals. The Court held, “that the motion for continuance of the trial filed after the speedy trial term expired but before any notice of expiration was filed has no effect.” The court relied on the fact that there was “no showing of unavailability during the ninety-day term of the rule and since no notice of expiration had been filed, there was no showing of unavailability during the right of recapture period which briefly extends the “term” of the rule.” The Court relied on Stewart v. State, 491 so. 2d 271(Fla. 1986). The Court distinguished State v. Naveira, 873 So. 2d 300 (Fla. 2004), because in that case, the State filed the information on the 175th day. Naveira then invoked rule 3.191 by filing his notice of expiration. Both the court and the State complied with the recapture period and set the case for trial within 10 days. Naveira was not ready and then requested a continuance. Therefore, Naveira was unavailable for trial and not entitled to the discharge. The Court also relied on State v. Leslie, 699 So. 2d 832(Fla. 3d DCA 1997).

SUMMARY OF ARGUMENT

Rule 3.19(k) of the Criminal Procedure Rules provides in part; “A person is unavailable for trial if the person or counsel is not ready for trial on the date

trial is scheduled. There was “no showing of unavailability during the Juvenile court ninety-day term of the rule and since no notice of expiration had been filed, there was no showing of unavailability during the right of recapture period which briefly extends the “term” of the rule.” The respondent was available during the ninety days. The case was not set for trial during that time period or during any time immediately following. It was not until that time period had expired that the respondent asked for a continuance. Therefore, it did not have the effect of waiving his right to discharge or the right to file a notice of expiration.

Rule 3.191 does not allow the State to effectively toll the running of the speedy trial period by allowing it to expire prior to filing of formal charges. Walden v. State, 979 So. 2d 1206(Fla. 4th DCA 2008). The State did not file formal charges in the adult Circuit Court until after the speedy trial time had expired. Therefore, it was not entitled to the Rule 3.191(p) recapture period. State is barred from filing any “charges based on the same conduct after the speedy trial period has expired.” Therefore, both cases must be discharged.

The nullity rule still applies in certain situations, such as; 1) the State fails to try the defendant within the recapture period, or 2) the State files an information, re-files an information following a nolle prose, or attempts to amend the information to add new charges, after expiration of the basic period. The State filed the charges in the adult Circuit Court after the expiration of the basic period.

Therefore, the respondent is entitled to the discharge of all the charges under the nullity rule.

ARGUMENT

ISSUE

DOES A MOTION FOR CONTINUANCE MADE AFTER THE EXPIRATION OF THE SPEEDY TRIAL PERIOD BUT BEFORE A DEFENDANT FILES A NOTICE OF EXPIRATION UNDER, THE RULE, WHICH ACTIVATES THE RIGHT OF RECAPTURE PERIOD, WAIVE A DEFENDANT'S SPEEDY TRIAL RIGHTS UNDER THE RULE?

a. The speedy trial rules in general and waiver of it

Rule 3.191(a) of the Florida Criminal Procedure Rules provides in part;

Speedy Trial without Demand. --Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime shall be brought to trial within 90 days of arrest if the crime charged is a misdemeanor, or within 175 days of arrest 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).

Rule 8.090(a) of the Florida Rules of Juvenile Procedure is the counterpart to rule 3.191. That rule provides in part:

(a) Time. If a petition has been filed alleging a child to have committed a delinquent act, the child shall be brought to an adjudicatory hearing without demand within 90 days of the earlier of the following:

(1) the date the child was taken into custody.

(2) the date of service of the summons that is issued when the petition is filed.

The facts of the case are undisputed. The defendant was not brought to trial within the trial period cited to in Rule 3.191(a). There was no evidence that this was through delay attributable to the respondent. Any continuance taken after this time period can not have an effect since the rule was not complied with.

Before, the respondent filed a notice of expiration, the State nolle prosequere the case and refilled the cases, after the speedy trial period. This action now precludes the State from the recapture period as well as proceeding with any other charges emanating from the same criminal episode. The court must look at all the occurrences in the trial court together.

In State vs. Leslie, 699 So. 2d 832 (Fla. 3d DCA 1997), the Court upheld the requirements of State vs. Agee, 622 So. 2d 473 (Fla. 1993). In that case, the information was filed two days after the expiration of the 175-day speedy trial period. The defendant then requested a continuance after the expiration of the speedy trial period which was granted by the court. The defendant then moved for discharge. The defendant was entitled to discharge under Genden v. Fuller, 648 So. 2d 1183, 1183 (Fla. 1994). The court held that, "the defendant requested a continuance after the speedy trial period had expired, but before the motion for discharge was filed. The court concluded that the defendant was entitled to discharge by also relying on the reasoning of Muller v. State, 387 So. 2d 1037(Fla.

3d DCA 1980). The court added in the concurring opinion that once the 175 day speedy trial period expires, the defendant's discharge is mandated, and there is no recapture window.

All the cases that the petitioner cites refer to defendants that take continuances during the speedy trial period. It is clear law that if a continuance is taken during the speedy trial period it is waived. However, that is not what occurred in the case at bar. The respondent did not take a continuance until after the speedy trial had expired. The speedy trial period in the Juvenile court, under the Florida Rule of Juvenile Procedure 8.090(a) expired on August 13, 2007. The case was then set for a calendar call on August 15, 2007. On that date, the respondent took a continuance to continue to participate in discovery.

b. State v. Naveira

The facts in the Naveira case are distinguished from the case at bar. In that case, the State filed the information during the speedy trial period. The defendant filed the notice of expiration of the speedy trial period. When the court set the case for trial that is when the defendant requested a continuance. In the case at bar, the State nolle prose the charges and then re-filed them after the speedy trial period had expired. The continuance was taken after the expiration of the speedy trial period. The defendant then filed the notice of expiration. Because the charges were re-filed after the expiration of the speedy trial period, they are not entitled to

the recapture period. The Fourth District Court of Appeals held that a post-expiration continuance does not waive the time limit when filed before the notice of expiration. Nelson at 1077.

For the foregoing reasons, the Respondent asserts that the Fourth District Court of Appeals distinguished Naveira properly in granting the writ of prohibition. The Court should affirm the decision below and remand to the trial court to discharge the defendant.

CONCLUSION

Based on the aforementioned, the Respondent respectfully requests that the certified question submitted by the Fourth District Court of Appeals should be answered in the negative. The decision of the Fourth District Court of Appeals should be affirmed directing the trial court to discharge the defendant.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's brief was delivered by mail to Thomas Winokur, Assistant Attorney General, Office of the Attorney General, P1-01, the Capitol, Tallahassee, FL 32399-1050 this _____ day of April 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Fla. R.
app. P. 9.210.

Lorena Mastrarrigo, Esq.
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APPENDIX TO INITIAL BRIEF

August 15, 2007 Notice