

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ANDREW NELSON,

Respondent.

CASE NO. SC08-2325

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Parties (such as the State and Respondent, ANDREW NELSON), emphasis, and the record on appeal will be designated as in the Initial Brief, and "IB" will designate Petitioner's Initial Brief, "AB," will designate Respondent's Answer Brief, each followed by any appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

In the Fourth District's opinion below, the Court indicated that "the case was called for trial" on August 15, 2007, but that on that date Respondent's counsel requested a continuance. Nelson v. State, 993 So.2d 1072, 1074 (Fla. 4th DCA 2008). In his answer brief, Respondent disputes this contention, claiming that "the case was set for the first Calendar Call" on August 15, 2007, rather than set for trial (AB 3). Respondent attached a non-record minutes sheet to his brief to support this contention.

The State sees no reason to dispute that the case was not called for trial on August 15, 2007, in spite of the Fourth District's statement to the contrary. This distinction is not relevant to the issue in this matter. In any event, it clearly appears that Respondent's continuance was intended to *prevent* the court from scheduling trial (or more accurately, adjudicatory hearing), which it otherwise would have done. The continuance was filed to delay the proceeding. The State cannot imagine any other reason why a defendant would request a continuance in a criminal case.

ARGUMENT
ISSUE

DOES A MOTION FOR CONTINUANCE MADE BEFORE
EXPIRATION OF THE RECAPTURE PERIOD WAIVE THE
TIME LIMITS UNDER RULES 3.191 AND 8.090?

Respondent argues in his summary that there was "no showing of unavailability" during the 90-day basic period, so that the continuance after the basic period expired was a nullity (AB 5-6). It appears that Respondent is attempting to address the following portion of the Fourth District's opinion:

The trial court must hold a hearing on the notice within five days, and the defendant must be brought to trial within ten days of the hearing on the notice, *unless* one of the grounds in rule 3.191(j) exists to excuse compliance with the rule. One of those reasons is the unavailability of the defendant under rule 3.191(k). That rule 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. A person who has not been available for trial *during the term provided for in this rule* is not entitled to be discharged."

Nelson at 1076.

In other words, the Fourth District was suggesting that the rule that a continuance waives the time limits arises from the "unavailability" exception, which is limited to "unavailability" during the basic period of rules 3.191(a) and 8.090(a). The State disagrees for three reasons.

1. *The juvenile speedy-trial rule explicitly states that a juvenile who has "voluntarily waived the right to speedy trial" is not entitled to invoke the recapture provision*

First, to the extent that the text of the speedy-trial rules themselves provides the direct basis for the rule of law that a defense-requested continuance waives the time limits (as opposed to case law interpreting those rules), the State contends that the "unavailability" exception is not the source of that rule.

This is especially apparent with the juvenile speedy-trial rule. Like the criminal speedy-trial rule, the juvenile rule requires the defendant to invoke a "recapture" provision before any entitlement to discharge arises. Fla. R. Juv. P. 8.090(m); Fla. R. Crim. P. 3.191(p). Like the criminal speedy-trial rule, the juvenile rule does not require trial within the recapture period until the court makes a "required inquiry" to determine whether an exception applies. Fla. R. Juv. P. 8.090(m) (1) & (3); Fla. R. Crim. P. 3.191(p) (1) & (3). Like the criminal speedy-trial rule, the juvenile rule includes "unavailability" as one of the listed exceptions. Fla. R. Juv. P. 8.090(d) (4); Fla. R. Crim. P. 3.191(j) (3). However, *unlike* the criminal rule, the juvenile rule explicitly includes "[t]he child has voluntarily waived the right to speedy trial" as a ground for refusing to require the State to try the juvenile within the recapture period. Compare Fla. R. Juv. P. 8.090(d) (1) with Fla. R. Crim. P. 3.191(j).

A defendant continuing a criminal proceeding is said to have "waived" the time limits of the rule. As such, the State contends that the "waiver" exception in rule 8.090(d) (1) includes any defense-requested continuance. The waiver exception does not

contain any language indicating that it is limited to continuances filed in the basic period; as long as the juvenile "voluntarily waived the right to speedy trial," he or she may not invoke the recapture provision. In any event, the State argues that the waiver provision of the juvenile rule demonstrates that the "unavailability" exception is not the source of the rule that continuances waive the time limits. Because Respondent here waived the time limits in a juvenile proceeding, the "waiver" exception applies, not the "unavailability" exception. As such, any suggestion that the unavailability exception is limited to the unavailability during the basic period simply does not apply to the case.

2. *Even under the criminal speedy-trial rule the "delay attributable to the accused" exception provides the basis for the rule that a defendant-requested continuance waives the rule's time limits, rather than the "unavailability" exception*

Again, subdivision (p) (3) of rule 3.191 requires the court to conduct an inquiry to determine if "one of the reasons set forth in subdivision (j) exists." The reason contained in subdivision (j) (2) is that "the failure to hold trial is attributable to the accused, a codefendant in the same trial, or their counsel."

The reason contained in subdivision (j) (3) is that "the accused was unavailable for trial under subdivision (k)." Subdivision (k) reads as follows:

(k) Availability for Trial. A person is unavailable for trial if the person or the person's counsel fails to attend a proceeding at which either's presence is required by these rules, or the person or counsel is not ready for trial on the date trial is scheduled. A person who has not been available for trial during the

term provided for in this rule is not entitled to be discharged. No presumption of nonavailability attaches, but if the state objects to discharge and presents any evidence tending to show nonavailability, the accused must establish, by competent proof, availability during the term.

"Unavailability" seems to be defined by two narrow circumstances: the defendant does not attend a required proceeding, and the defendant is not ready for trial "on the date trial is scheduled." Neither of the circumstances seems to encompass the general rule that a continuance waives the time limits. In contrast, the exception stating that "the failure to hold trial is attributable to the accused" is better aligned with the general rule that a continuance waives the time limits. A trial is not held because the defendant continued it, an act "attributable" to the defendant. See Banks v. State, 691 So.2d 490, 491 (Fla. 4th DCA 1997):

Florida Rule of Criminal Procedure 3.191(j) states that where a trial is continued at a defendant's request, the resulting delay is "attributable to the accused."

The State agrees. As a general matter, a continuance waives the speedy-trial time because it constitutes a delay "attributable to accused," not because the defendant is "unavailable." Because the "attributable to the accused" exception contains no language regarding the "term provided for in this rule," the rule does not provide support for the Fourth District's interpretation.

3. *Even if the "unavailability" exception provided the basis for the rule that a continuance waives the time limits, it does not limit its applicability to continuances during the basic period.*

To repeat, the State asserts that the general rule that continuances waive the speedy-trial time limits arise from multiple sources, including the "attributable to the accused" exception, and case law interpreting the speedy-trial rules. Thus, any purported limitation of the unavailability exception to the "term provided for in this rule" does not foreclose application of that general rule to other periods of time. However, even if the unavailability exception provided the *only* basis for that rule of law, the State does not agree that it is limited to the basic period. Like many provisions of the speedy-trial rules, the "unavailability" subdivision has not been substantially altered since before the advent of the recapture provision in 1985. See Fla. R. Crim. P. 3.191(e) (1983).

The phrase "during the term provided for in this rule" certainly had a different meaning prior to the 1984 amendment than it has today. The "term" prior to the 1984 amendment obviously meant the basic period of rule 3.191(a). In general, the basic period was the only "term" provided in the rule, and at the conclusion of that "term," the defendant was entitled to discharge, unless the defendant was "not available for trial" during the term. This process bears little resemblance to the current structure of the rule. A defendant today is entitled to nothing at the conclusion of the basic period, except that the defendant acquires a right to demand an immediate trial. A defendant is not entitled to discharge unless the State fails the defendant after the defendant chooses to file a notice of expiration,

and after the State fails to try the defendant within the recapture period. Thus, the most reasonable interpretation of the phrase "term provided for in this rule" under the current rule is the period of time between arrest and the expiration of the recapture period.

Moreover, even if the phrase "term provided for in this rule" meant only the basic period, the Fourth District's conclusion does not necessarily follow. A rule that a defendant who has "not been available for trial" during the basic period is "not entitled to be discharged" does not lead to the conclusion that a defendant who *has* been available for trial during the term provided for in this rule *is* entitled to be discharged. Right to discharge under the current rule involve much more than merely being "available" during the basic period.

This Court in State v. Naveira, 873 So.2d 300 (Fla. 2004), did rely on the unavailability exception as the basis for its ruling that the defendant there was not entitled to discharge. However, the issue in Naveira was not whether the defendant was entitled to file a notice of expiration because he continued the proceedings. The Naveira defendant was entitled to file a notice of expiration, and *did* file one. Naveira at 302. The trial court found that none of the exceptions in subdivision (j) applied, and scheduled trial within the recapture period. Id. It was not until after the court scheduled the trial within the recapture period that the defendant requested a continuance. Id. The continuance was granted and the trial was not held in the recapture period, after which Naveira moved for discharge.

Id. This Court held that Naveira was not entitled to discharge because he was unavailable under the rule. Naveira at 307.

While the State believes that this Court could just as easily have relied on the "attributable to the accused" ground in Naveira, the unavailability exception does seem more applicable when the defendant invokes the recapture period, trial is scheduled, and only then does the defendant ask for a continuance. After the recapture period expires, the issue is whether the defendant is "entitled to be discharged," not whether the defendant may invoke the recapture period. This is consistent with the language of the unavailability exception, which states that the defendant is not "entitled to be discharged" if not ready for trial. When, in contrast, a defendant requests a continuance prior to invoking the recapture period, the question is *not* whether the defendant is "entitled to be discharged;" it is only whether the defendant can invoke the recapture. As such, Naveira in no way suggests that the unavailability exception is the only basis for the rule that a continuance waives the time limits.

The Fourth District's ruling constitutes a classic example of form over substance. The decision below provides no cogent reason why a pre-expiration continuance waives the speedy-trial time limits whereas a post-expiration continuance does not. As the State argued in the initial brief, there is in fact no cogent reason to make that distinction. A defendant who continues proceedings more than 175 days after arrest has sought to delay proceedings just as surely as a defendant who continues proceeding prior to the end of the basic period. Respondent is simply attempting to hammer a square peg into

some round hole in the speedy-trial rule. The State contends that the purpose and structure of the rule plainly support its position, and that the attempts to distinguish pre- and post-expiration continuances are merely an exercise in pointless sophistry.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question, as restated by the State, should be answered in the affirmative, the decision of the District Court of Appeal reported at 993 So.2d 1072 should be disapproved, and the order denying the motions for discharge entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Lorena V. Mastrarrigo, Esq., 7951 SW 6th Street, #200, Plantation, Florida 33324, by MAIL on May 15, 2009.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

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