IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO. SC 02-633

v.

JUAN NAVEIRA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the appellant in the district court of appeal. Respondent, JUAN NAVEIRA, was the defendant in the trial court and the appellee in the district court of appeal. In this brief the petitioner will be referred to as the STATE and the respondent will be referred to as NAVEIRA.

STATEMENT OF THE CASE AND FACTS

NAVIERA accepts the statement of the case and facts set forth in the STATE's brief as a correct and accurate recitation, except for the following. The extreme delay in filing the information was only partly due to a witness problem, it was primarily caused by the prosecutor's neglect. (R 48).

Also, on August 26, 1999, when the court held the hearing on the notice of expiration the court indicated that the *only* time the court could set the case for trial during the two (2) weeks was August 30, 1999, four (4) days later.

SUMMARY OF THE ARGUMENT

ISSUE I

The STATE filed the information in this case on the 175th day. The defendant filed a notice of expiration the same day the defense received the information in the mail, the 180th day. The court held a hearing on the notice of expiration on August 26, 1999. The court then set the case for trial on the only available date the court had, August 30, 1999, four (4) days later. Obviously recognizing that a defense in this case (or any case) takes longer than four (4) days, the court granted a continuance and properly charged it to the STATE.

The STATE's argument that because they included a discovery response with the information there was no discovery violation is silly. Common sense, discovery rules and due process principles all dictate that four (4) days is not a sufficient time to prepare a defense.

The STATE's alternative argument that by filing a notice of expiration the defendant is compelling the STATE to bring him to trial within 15 days and presumes the defendant is ready for trial is misplaced. A notice of expiration is not a demand for speedy trial. It is merely a notice to the trial judge that the speedy trial period has expired and an inquiry must be made into the circumstances. To maintain that a notice of expiration has the same

legal ramifications as a demand is to completely eviscerate the speedy trial rule.

SUMMARY OF THE ARGUMENT

ISSUE II

Florida Rule of Criminal Procedure 3.191(m) applies to a person "… who is to be tried again or whose trial has been delayed…" NAVEIRA never was tried the first time and no trial was possible because the defendant was entitled to discharge because the recapture period had expired. To suggest that the 90-day post-appeal rule applies to speedy trial discharge issues after the recapture has expired is incredible. The recapture period would become meaningless because the state would just have to file an appeal and get a fresh 90 days to bring the defendant to trial.

ARGUMENT - ISSUE I

THE TRIAL COURT DID NOT ERR BY "CHARGING TO THE STATE" A CONTINUANCE REQUESTED BY RESPONDENT ON THE GROUND THAT THE STATE'S DELAY IN FILING THE INFORMATION PREVENTED HIM FROM ADEQUATELY PREPARING FOR TRIAL, AND THEN SUBSEQUENTLY DISCHARGING RESPONDENT WHEN THE STATE DID NOT TRY HIM WITHIN THE TIME PERMITTED BY RULE 3.191 BECAUSE OF THE CONTINUANCE.

STANDARD OF REVIEW

NAVEIRA agrees with the STATE's statement of the proper standard of review on this issue.

MERITS

It is not disputed that persons charged with crimes have a right to a speedy trial. This right is guaranteed by the constitution. The purpose of the speedy trial rule is to implement the practice and procedure by which a defendant may seek and be guaranteed his speedy trial. State ex rel. Butler v. Cullen, 253 So. 2d 861, 863 (Fla. 1971). In this case NAVEIRA simply followed the dictates of the rule to seek and be guaranteed his speedy trial. Since the STATE was unable to comply with the appropriate procedure and bring NAVEIRA to trial in the time set forth by the rule the trial court correctly ordered his discharge.

In anticipation that he would be formally charged NAVEIRA filed a pleading which included a demand for discovery. The fact that the demand

for discovery was filed before the information did not require the STATE to provide discovery immediately but did trigger the STATE's responsibility to provide discovery once the information was filed. See Pura v. State, 789 So. 2d 436, 439 (Fla. 5th DCA 2001). While there is no constitutional right to discovery in criminal cases, criminal defendants do have a right to discovery under the applicable rule. State v. Ross, 792 So. 2d 699, 701 (Fla. 5th DCA 2001).

In this case the STATE knew, even before NAVEIRA was formally charged, that discovery would need to be provided. Presumably, the STATE also knew that, under the dictates of Florida Rule of Criminal Procedure 3.220(b)(1), there would only be 15 days in which to provide discovery once the information was filed. While the STATE is not required to provide discovery until after the filing of a charging document, there is nothing in a case like this, where the STATE is put on notice of a defendant's desire to participate in discovery before the filing of a charging document, that prohibits the STATE from providing discovery before the filing of the information.

The purpose of criminal discovery is to avail the defense of evidence known to the state so convictions will not be obtained by the suppression of evidence favorable to a defendant or by surprise tactics in the courtroom.

State v. Kuntsman, 643 So 2d 1172, 1174 (Fla. 3d DCA 1994). This being the case, clearly the discovery rule requires more than the state being permitted to just hand over a list of witnesses and copies of reports and then requiring a defendant to proceed immediately to trial. In order to ensure that favorable evidence is not being suppressed or there will not be surprise in the courtroom the defense must be given an opportunity to review and investigate based on the discovery provided.

In fact, Florida Rule of Criminal Procedure 3.160(d) says that after a plea of not guilty a defendant is entitled to a reasonable time in which to prepare for trial. It has been held that adequate time to prepare a defense is inherent in the right to counsel and is founded on due process principles. Griffen v. State, 598 So. 2d 254, 256 (Fla. 1st DCA 1992); Brown v. State, 426 So. 2d 76, 80 (Fla. 1st DCA 1983). Surely the STATE did not believe that 15 days was sufficient to prepare a defense in a serious case involving a child victim and DNA evidence.

In this case the STATE, even though it had been made aware that NAVEIRA would have to be furnished with discovery, waited until the last day allowed, i.e. the 175th day after arrest, to file an information. At this point there were 15 days to provide discovery and possibly 15 days in which to bring NAVEIRA to trial. The fact that the STATE provided discovery in

less than the 15 days allowed does not affect the fact that NAVEIRA was entitled to a discharge. That is because the state must furnish discovery within sufficient time to allow the defendant to prepare for trial without forfeiting his right to a speedy trial. Hayden v. State, 760 So. 2d 1031, 1033 (Fla. 2d DCA 2002); Stavely v. State, 744 So. 2d 1051, 1052 (Fla. 5th DCA 1999) rev. denied 760 So. 2d 948 (Fla. 2000).

NAVEIRA argued, and the trial judge agreed, that he was not provided with discovery within sufficient time to properly prepare for trial. Of course it must be remembered that this case does not deal with a charge of grand theft but does involve a charge of sexual battery which is a very serious charge and can be very difficult to properly prepare to defend against.

The fact that the STATE informed the trial judge that they would be willing to go to trial with just one witness and have the witness available for deposition should not have any effect on the decision in this case. That is because of the purpose of discovery as set out above. While the procedure proposed by the STATE may have satisfied the requirement that there be no conviction obtained by surprise in the courtroom, it could not provide the defense with assurances that favorable evidence was not being suppressed. In fact, the STATE would only heighten the fears of most criminal defense

attorneys that there was more to the case than they were being led to believe by trying to severely limit the evidence and discovery proceedings.

The fact that the STATE did not file the information until the last possible day to do so could only have served to cause speedy trial and discovery problems in this case. These problems were caused solely by the STATE's action. Once the STATE caused these two issues to bump up against each other the trial court took exactly the appropriate action.

The reason the trial court was correct is because a defendant should not have to choose between the right to a speedy trial and the right to discovery within sufficient time to adequately prepare for trial. Vega v. State, 778 So. 2d 505, 506 (Fla. 3d DCA 2001). Also, if material discovery is not furnished in sufficient time for the defendant to prepare for trial before the speedy trial time expires, the court can continue the case and charge it to the state even if it results in a later dismissal for violation of the speedy trial rule. Stavely v. State, supra at 1053.

The speedy trial rule is an existing, viable rule. Likewise, the discovery rule is an existing, viable rule. When the purposes of the rules, the procedures they set forth and rights they provide to criminal defendants are examined it is clear that the trial court and district court of appeal reached

the correct result in this case. If the STATE prevails in its argument one, the other or both the rules will be obliterated.

Under the STATE's position the following scenario would be appropriate in any, or every, criminal case. The STATE could file an information, or obtain an indictment, on the 175th day after a person is arrested. The next day the defendant would be entitled to file a notice of expiration of time. Presuming discovery is requested by the defendant, it could be furnished on the 14th day, which is with in the time allowed by the rule. The defendant would then request a continuance, which would be charged to the defendant since the state did not technically violate the rule, and waive the time periods set forth in the speedy trial rule. If no continuance is requested the defendant would have to proceed to trial without being able to adequately investigate the case, make use of discovery materials and/or prepare for trial.

The STATE relies on State v. Fraser, 426 So. 2d 46 (Fla. 5th DCA 1982) rev. denied 436 So. 2d 98 (Fla. 1983), however that decision should not control this case. First, in that case discovery was provided September 4th for a trial to be held on September 28th . That was a 24 day period. In this case the discovery was received by NAVEIRA on August 24th and trial was scheduled to be held on August 30th . That is a four day period. (In

actuality it is six days but since it is less than 7 days the intervening weekend is not counted, see Florida Rule of Criminal Procedure 3.040, and the order setting the trial for August 30th only gave NAVEIRA four days to prepare for trial.)

Second, in Fraser the information was filed 81 days after the defendant's arrest. Had a demand for discovery been filed prior to filing of the information, as was done in this case, there would have been more than ample time to complete discovery before the running of the speedy trial time. In this case, because the STATE did not file the information until the 175th day, that was not possible.

Finally, in Fraser trial counsel admitted to the court that he scheduled no depositions after a specific date because he did not wish to demonstrate unavailability by ongoing discovery proceedings. The court disapproved this sort of "gotcha" tactics. Id. at 49. In this case NAVEIRA did not engage in any "gotcha" tactics. NAVEIRA filed the demand for discovery early so the discovery would be received as soon as possible. It is totally and solely the STATE's action, in filing the information when it did, that caused problems in this case.

The STATE also relies on Banks v. State, 691 So. 2d 490 (Fla. 4th DCA 1996) (en banc) rev. denied 699 So. 2d 1371 (Fla. 1997). The STATE

notes that Banks states a general principle that a defense request for continuance waives the 175 day speedy trial rule, "… absent state misconduct, inexcusable delay in providing discovery, or other violation of defense discovery rights…" Id. at 491, 492. The STATE concludes that since discovery was provided in the time provided by the rule there was no misconduct, inexcusable delay or other violation. Unfortunately, there was a violation of the right to be provided discovery within sufficient time to allow NAVEIRA to prepare for trial without forfeiting his right to a speedy trial so the STATE's analysis based on this case fails.

The STATE also argues that due to amendments to the speedy trial rule in 1984, which added the recapture period the analysis of the cases relied on by the lower courts is no longer valid. It should be noted that State v. Fraser, supra, upon which the STATE relies was decided prior to the amendments while Hayden v. State, supra and Stavely v. State, supra upon which NAVEIRA relies were decided after the amendments.

It is of interest to note that again if the STATE prevails the speedy trial rule and/or discovery rule can be obliterated by the STATE. The STATE would be able to file an information on the 175th day and provide discovery on the 15th day following that filing. The filing of a notice of expiration would lead to an automatic waiver of the speedy trial period

contained in the rule as a defendant could not be ready having received the discovery on the day of trial (if the trial is set for the last day of the recapture period) or after trial (if the trial is set prior to the last day of the recapture period).

The STATE argues that the filing of a notice of expiration is some sort of demand by a defendant to be tried within a certain period of time. It is not. If the defendant wishes to demand a trial within a specified period he can do so under Florida Rule of Criminal Procedure 3.191(b). It must be noted that under Florida Rule of Criminal Procedure 3.191(g) a demand for speedy trial binds the accused and shall not be filed unless the accused has a bona fide desire to obtain a trial sooner than otherwise might be provided. Additionally, a demand for speedy trial is a pleading that the accused has diligently investigated the case and is ready for trial or will be ready within 5 days. The rule also specifies under what circumstances continuances can be granted to an accused who has filed a demand for speedy trial.

A notice of expiration does not carry with it the same ramifications as a demand for speedy trial. It is a notice to the trial judge that the speedy trial period provided by the rule has expired and an inquiry must be made into the circumstances. Under Florida Rule of Criminal Procedure 3.191(p)(3) a defendant not brought to trial in the recapture period through no fault of the

defendant is entitled to be discharged. The STATE's attempt to have the notice of expiration turned into another form of a demand for speedy trial should not be permitted.

NAVEIRA filed a notice as he was entitled to do. The judge held an appropriate inquiry. Since the STATE did not provide discovery in a sufficient time for NAVEIRA to prepare for trial without waiving his right to speedy trial the judge properly charged a continuance to the state and set the trial beyond the speedy trial limit. The trial court and district court of appeal rulings were correct.

ARGUMENT – ISSUE II

THE TRIAL COURT DID NOT ERR IN RULING THAT, AFTER A SUCCESFUL STATE APPEAL, IT COULD STILL DECIDE WHETHER THE STATE HAD FAILED TO TRY RESPONDENT WITHIN THE RECAPTURE PERIOR OF RULE 3.191 (P) WHEN THERE WAS NO TIME LEFT IN THE SPEEDY TRIAL PERIOD (RESTATED)

STANDARD OF REVIEW

NAVEIRA agrees with the STATE'S statement of the proper standard of review on this issue

MERITS

On this issue the STATE'S primary argument is that following the first appeal in this case, State v. Naviera, 768 So. 2d. 1254 (Fla. 1st DCA 2000), it was entitled to an additional 90 days to bring NAVEIRA to trial. The STATE relies on a rule and a decision of this court in support of its argument.

The rule is Florida Rule of Criminal Procedure 3.191 (m), which it sets forth in its entirety on pages 33 and 34 of its brief. The problem is that the STATE emphasizes the wrong language of the rule. The proper emphasis should be the language that it applies to a person "…who is to be tried again or whose trial has been delayed…" Clearly NAVEIRA was not to be tried again because he had not been tried a first time. He also did not have his trial delayed because, as the trial court found and the district court

of appeal affirmed in State v. Naveira, 807 So. 2d. 766 (Fla. 1st DCA 2002), no trial was available to the STATE since NAVEIRA was entitled to discharge.

The case on which the STATE relies is State v. Rohm, 645 So. 2d. 968 (Fla. 1994). A look at the certified question shows why the STATE'S reliance on that case is misplaced. The certified question is as follows:

> When the speedy trial provided in rule 3.191 (a) has fully run, and the trial court grants a timely motion for discharge during the unexpired 15-day window period which is reversed on appeal, does the state on remand have the 15-day window period to bring the defendant to trial, or instead the 90 day appellate mandate period?

It is clear from the question that in that case there was still time remaining in the recapture period when the appeal was taken. In this case there was no time remaining in the recapture period so NAVEIRA could not be brought to trial.

It should also be noted that in Rohm, this court held that the 90-day speedy trial period of Florida Rule of Criminal Procedure 3.191 (m) applied whenever a trial has been delayed by appeal. Id. at 968. This follows the language of the rule but again is not applicable in this case since NAVEIRA'S trial was not delayed by the first appeal. It was NAVEIRA'S discharge that was delayed by that appeal.

The STATE also quotes another lengthy portion of the Rohm decision on page 36 of its brief. The problem that the STATE runs into yet again is that in that portion of the opinion it was acknowledged that it applies when time remains in the speedy trial period i.e. "There have been appeals taken when there was little of the basic 180-day period remaining, not unlike the 15-day period in dispute here." It does not hold that the 90-day period applies where the speedy trial period is completely over.

If the STATE'S argument is accepted it would permit complete nullification of the speedy trial rule. Any time the STATE saw that a trial court was going to properly grant a motion for discharge it could file an appeal on some issue, no matter how trivial or frivolous, and upon the appeal being denied and a mandate issued, the STATE could claim an additional 90 days to bring the defendant to trial.

The STATE knew it had filed on information at the end of the basic speedy trial period. It knew that a notice of expiration had been filed. Given these facts the proper course of action for the STATE would have been to seek an extension of time pursuant to Florida Rule of Criminal Procedure 3.191 (i). An extension of the recapture period could have been sought so long as it had not yet expired, see Brown v. State, 715 So. 2d. 241 (Fla. 1998). Of course without NAVEIRA'S stipulation the STATE would have

had to show exceptional circumstances or good cause to obtain such an extension and that may have been the condition which caused the STATE not to do so.

The STATE also argues that the trial court did not have the ability to rule on the issue of the expiration of the recapture period since it was not raised during the first appeal. The first ruling by the trial judge was that NAVEIRA was entitled to discharge since the information was not filed until the 176th day. The second ruling was that the 15 day recapture period had expired without NAVEIRA being brought to trial.

The STATE cites to cases holding that a trial court ruling can be upheld if it is right even if the reasoning is wrong. It then argues that the collateral matter should have been raised in the initial appeal to support the trial court's ruling. What the STATE does not explain is how an argument that the recapture period had expired supports a ruling that the information was not timely filed.

The STATE argues, on page 37 of its brief, that the issue in the first appeal was whether the trial court erred in granting NAVEIRA's motion for discharge. This is not correct. The court itself set out that the sole issue presented was whether the day of arrest is counted in the calculation of the speedy trial rule time. State v. Naveira, 768 So. 2d at 1255.

Also, the arguing of additional grounds is not mandatory. The case cited by the STATE says "It stands to reason the appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Board v. Radio Station WQBA, 757 So. 2d 638, 645 (Fla. 1999). Additionally, the STATE does not point to any case which holds that the failure to raise any other grounds to support a trial court ruling waives the argument upon remand.

The final matter to be discussed is the footnote in the first opinion. The body of the opinion says that the information against NAVEIRA was timely filed within the time allowed by the speedy trial rule because the day of arrest is excluded from the 175 day calculation. The footnote states that the recapture provisions are not implicated as they presuppose that an information or indictment has been filed within the initial 175 day period.

NAVEIRA believes the proper meaning of the footnote is that since Florida Rule of Criminal Procedure 3.191(a) allows 175 days in which to bring a defendant to trial, the filing of an information on the 175th day necessarily means that the STATE has prohibited the court from accomplishing what is required and therefore is not entitled to the recapture period.

The trial court and district court of appeal were correct in ruling that NAVEIRA was entitled to be discharged.

CONCLUSION

Based on the foregoing NAVEIRA respectfully requests that this Honorable Court affirm the decision in State v. Naveira, 807 So. 2d 766 (Fla. 1st DCA 2002) and uphold the order entered by the trial court discharging NAVEIRA from the crime charged against him.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Thomas D. Winokur, Assistant Attorney General, Office of the Attorney General P1-01, The Capitol , Tallahassee, FL 32399-1050, on this ____ day of November, 2002.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

_____
Erik Courtney, Esq.