

Third District Court of Appeal

State of Florida, January Term, A.D., 2010

Opinion filed April 28, 2010.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-86
Lower Tribunal No. 08-3961

Eddie Brown,
Petitioner,

vs.

The State of Florida,
Respondent.

A Case of Original Jurisdiction – Prohibition .

Carlos J. Martinez, Public Defender, and Maria E. Lauredo, Assistant Public Defender, for petitioner.

Bill McCollum, Attorney General, and Nikole Hiciano, Assistant Attorney General, for respondent.

Before WELLS, SHEPHERD, and LAGOA, JJ.

LAGOA, J.

The Petitioner, Eddie Brown (“Brown”), seeks the issuance of a writ of prohibition and an order discharging him in criminal case number F08-3961. For the following reasons, we deny Brown’s petition for a writ of prohibition.

I. FACTUAL AND PROCEDURAL HISTORY

On January 31, 2008, Brown was arrested for an alleged sale of cocaine. On February 21, 2008, the State of Florida announced a “no action” on the case and Brown was discharged. On May 5, 2008, the State filed a new information charging Brown with the same sale of cocaine, and the trial court issued a warrant for Brown’s arrest. Brown was not re-arrested, pursuant to the May 5th warrant, until December 4, 2008. On December 9, 2008, counsel for Brown filed a motion for final discharge under the State’s procedural speedy trial rule, arguing that Brown was entitled to final discharge, without application of the rule’s 15-day window or recapture period, because the State did not re-arrest or otherwise notify Brown that charges had been filed against him until after the 175-day speedy trial period had expired.

II. APPLICATION OF RULE 3.191

Florida Rule of Criminal Procedure 3.191 sets forth the procedural speedy trial rule. Rule 3.191’s time limit, however, is not a constitutional one. See State v. Naveira, 873 So. 2d 300, 308 (Fla. 2004); State v. Bivona, 496 So. 2d 130, 133 (Fla. 1986) (“Florida’s speedy trial rule is a procedural protection and, except for the right to due process under the rule, does not reach constitutional dimension.”). Indeed, a defendant who waives rule 3.191’s time limits still retains the constitutional right to a speedy trial, which is measured in terms of reasonableness

and prejudice, not number of days since arrest.¹ Here, Brown has not alleged a constitutional speedy-trial violation.

On appeal, Brown asserts that he must be automatically discharged, and need not file a Notice of Expiration of the speedy trial period. Indeed, during oral argument, counsel for Brown argued that if the State filed its information on the 175th day following Brown's arrest, he would be entitled to an automatic discharge on the 176th day if a trial had not yet commenced. Brown misconstrues the time limits set forth in rule 3.191.

Rule 3.191 requires the State to try a defendant on short notice if the defendant voluntarily invokes this procedure. In Naveira, 873 So. 2d at 305-06, the Supreme Court set forth the speedy trial rule's requirements:

Rule 3.191(a) provides that a person charged with a crime by indictment or information "shall be brought to trial . . . within 175 days if the crime charged is a felony."

¹ It is well-settled that four factors must be analyzed when evaluating a constitutional speedy trial claim: "(1) the length of the delay, (2) the reason for the delay, (3) whether and when the defendant asserted the right to a speedy trial, and (4) whether defendant has suffered actual prejudice as a result of the delay." United States v. Schlei, 122 F.3d 944, 986-87 (11th Cir. 1997) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)); see, e.g., United States v. Twitty, 107 F.3d 1482, 1490 (11th Cir. 1997). "[N]o single factor is sufficient to find a deprivation of the defendant's Sixth Amendment right," Schlei, 122 F.3d at 987, and, unless the length of the trial delay is "presumptively prejudicial," i.e., the delay approaches or exceeds one year, an inquiry into the other three factors is not triggered. Id.; Twitty, 107 F.3d at 1490; Ringstaff v. Howard, 885 F.2d 1542 (11th Cir. 1989). Finally, unless the first three factors all weigh *heavily* against the State and indicate that a constitutional speedy trial violation occurred, "a defendant must show he suffered actual prejudice from the delay." Twitty, 107 F.3d at 1490; see also United States v. Davenport, 935 F.2d 1223, 1239 (11th Cir. 1991).

The time periods established by rule 3.191(a) commence when the person is taken into custody as defined under subdivision (d). Subdivision (d) provides that for purposes of the rule, a person is taken into custody “(1) when the person is arrested as a result of the conduct or criminal episode that gave rise to the crime charged.”

Although the rule requires the State to bring the defendant to trial within 175 days, **the remedy for a violation (assuming the defendant is charged within the speedy trial period) is not an automatic discharge.** Rather, when the deadline expires, a defendant may invoke the recapture provisions of rule 3.191(p). Rule 3.191(p)(2) provides that “[a]t any time after the expiration of the prescribed time period, the defendant may file a separate pleading entitled ‘Notice of Expiration of Speedy Trial Time,’ and serve a copy on the prosecuting authority.” The filing of such a notice invokes two deadlines. First, rule 3.191(p)(3) provides that no later than five days from the date of the filing of the notice, the trial court shall hold a hearing on the notice. The rule further provides that the defendant be brought to trial within ten days *unless* one of the reasons set forth in subdivision (j) exists. Only when the defendant is not brought to trial within ten days *and* none of the reasons set forth in subdivision (j) exists may the defendant be discharged. Fla. R. Crim. P. 3.191(p)(3). In fact, the rule emphasizes that “[n]o remedy shall be granted to any defendant under this rule until the court has made the required inquiry under subdivision (j).” Fla. R. Crim. P. 3.191(p)(1).

* * * *

[W]hen the 175-day speedy trial period expires, the defendant is not automatically entitled to a discharge. Rather, the defendant may then invoke the rule by filing a notice of expiration of the speedy trial time. At that point, the court must hold a hearing within five days and then schedule a trial within ten days. If a trial is not held during that period, the defendant must be discharged *unless* one of the circumstances in subdivision

(j) applies. One of those circumstances is the defendant's unavailability. Unavailability includes circumstances where either the defendant or defense counsel is not ready for trial on the date it is scheduled.

(emphasis added). In State v. Nelson, 26 So. 3d 570 (Fla. 2010), the Supreme Court reaffirmed the timetable set forth in Naveira.

Brown does not dispute that he was re-charged within the 175-day speedy trial period. As such, upon his re-arrest, Brown's remedy for the expiration of the rule's speedy trial period was to file a Notice of Expiration and thereby trigger the timetable described in Naveira, i.e., a trial within 15 days. This is consistent with the rule's intent to secure a speedy trial, not to ensure a speedy discharge. See Nelson, 26 So. 3d at 574, 576 ("When a defendant is charged within the speedy trial period, the remedy for a violation of the rule is *not* an automatic discharge. Rather, the remedy for the State's failure to try a defendant within the specified time is provided for in Florida Rule of Procedure 3.191(p). . . . [T]he recapture period illustrates the principle that a defendant has a right to speedy trial, not a right to speedy discharge without trial."). Brown, however, chose not to file a "Notice of Expiration of Speedy Trial Time," and, during oral argument, asserted that he was not required to file the notice because the 175th day had passed since his initial arrest without a trial. We find Brown's argument without merit.

Under rule 3.191, a criminal defendant does not have a right to a trial within a certain number of days after arrest. The only demand a defendant can make upon

the State (other than to file a demand pursuant to rule 3.191(b)), is to compel the State to bring him to trial within 15 days after he files a Notice of Expiration. The Notice of Expiration, however, must be filed after the 175-day speedy trial period runs. “This pleading invokes the defendant’s speedy trial rights and triggers the recapture window, which is an additional ten-day period for the State to bring the defendant to trial after the default speedy trial period expires.” Nelson, 26 So. 3d at 574.

Prior to 1984, criminal defendants had an explicit right to be tried within a certain number of days (180 days for a felony), and “if not brought to trial within such time shall upon motion timely filed with the court having jurisdiction and served upon the prosecuting attorney be forever discharged from the crime.” See Fla. R. Crim. P. 3.191(a)(1) (1983). Accordingly, if Brown’s case were governed by the old rule, he could assert that he had a “right” to be tried within a certain number of days from the date of arrest or be automatically discharged. The rule, however, was amended in 1984 and again in 1992.

In 1984, the Florida Supreme Court amended rule 3.191 to add the recapture provision. See Fla. Bar Re: Amendment to Rules-Criminal Procedure, 462 So. 2d 386 (Fla. 1984). Pursuant to the 1984 amendment, a defendant could move for discharge when the speedy-trial period (now 175 days for felony charges) expired, but could not be discharged unless the State failed to try the defendant within the 15-day recapture period.

In 1992, the Court amended rule 3.191 to its current form prohibiting a defendant from even filing a motion for discharge until after he or she has filed a Notice of Expiration of the speedy-trial period and has not been tried within the recapture period. See In re Amendments to Florida Rules of Criminal Procedure, 606 So. 2d 227 (Fla. 1992).

Under the current rule, an individual charged with a felony no longer has a free-standing right to a trial within a certain number of days after arrest. The only right that a defendant charged with a felony possesses under rule 3.191 is to require the State to try him or her within 15 days of filing and serving the State with a Notice of Expiration (assuming, of course, that 175 days has passed since arrest). Because the speedy-trial rule is no longer self-executing, a defendant must take the affirmative step of filing a Notice of Expiration. See Nelson, 26 So. 3d at 574 (“Although all defendants are entitled to the benefit of the default rule, the rule is not self-executing and requires a defendant to take affirmative action to avail him- or herself of the remedies afforded under the rule based on the State’s failure to comply with the time limitations.”); State v. Gibson, 783 So. 2d 1155, 1158 (Fla. 5th DCA 2001) (“The provisions of rule 3.191 make it evident that the rule is not self executing: it requires the defendant to take certain steps to trigger application of rule 3.191(p)(3) which will either ensure a speedy trial or a discharge from the alleged crime.”); State v. Robinson, 744 So. 2d 1151, 1153 (Fla. 1st DCA 1999).

Here, the State filed a timely information. Rather than filing a Notice of Expiration, as required by the rule, Brown filed a notice for automatic discharge.²

Because the State charged Brown within the 175-day speedy trial period from his initial arrest date, we find that Brown was not entitled to an automatic discharge. Rather, Brown was entitled to file a Notice of Expiration – a right which he declined to exercise. Accordingly, for the reasons stated, we deny the writ.

² We further note that, pursuant to the Supreme Court’s Nelson decision, Brown waived his speedy trial rights under the default period of the rule. Although Brown failed to file a Notice of Expiration, the trial court proceeded as if Brown had filed a notice of expiration, and pursuant to rule 3.191(p)(3), the trial court held a hearing within five days and scheduled Brown’s trial within ten days. On the date of trial, however, Brown’s counsel requested a continuance and stated that “he was not ready for trial.” The trial court granted the continuance, and charged it to both the State and Brown. The record shows, however, that the State was prepared to go to trial. In Nelson, 26 So. 3d at 580, the Supreme Court held that a motion for continuance that is chargeable to the defense and made after the expiration of the speedy trial period but before a defendant files a notice of expiration waives a defendant’s speedy trial rights under the default period of the rule.