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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 3 1992
CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

DAVID DELL'ORFANO

Petitioner,

v.

Case No.: 79,506

4th DCA Appeal No.: 90-00955

STATE OF FLORIDA

Respondent.

_____ /

On Petition for Discretionary Review of a
Decision of the Fourth District Court of Appeal
of the State of Florida

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner David Dell'Orfano **was** charged by information with one count of sexual battery on a person less than twelve years of age and three counts of lewd or lascivious assault. All acts were alleged to have occurred "on one or more occasions between the 1st day of August, A.D. 1985 and the 30th day of June, A.D. 1988 inclusive." (R. 49).

Petitioner filed a Motion for Statement of Particulars (R. 52) and a Motion to Dismiss. (R. 54). The latter motion argued that the thirty-five month time period alleged in the information was too vague and indistinct to permit the preparation of an adequate defense, and also raised the danger of multiple prosecutions for the same offense, all in violation of the Florida Rules of Criminal Procedure and the Fourteenth Amendment of the United States Constitution. (R. 54-63).

A hearing on the Motion to Dismiss was held before the Honorable Robert Carney. (R. 1-48). At that hearing the State narrowed the time-frame involved to the period from January 1986 through June 30, 1988, a **period of twenty-seven months.** (R. 37).

For purposes of argument, the court below assumed that the State could not further narrow that twenty-seven month time-frame. (R. 38). After reviewing the

case law, the court held that as a matter of law the period of twenty-seven months was too broad to allow for the preparation of an adequate defense, and accordingly dismissed the information. (R. 40-42).

The State timely appealed the dismissal to the Fourth District Court of Appeal, which reversed the order of dismissal and remanded for further proceedings. *State v. Dell'Orfano*, 592 So.2d 338 (Fla. 4th DCA 1992). In so doing, the Fourth District certified conflict with *Goble v. State*, 535 So.2d 706 (Fla. 5th DCA 1988).

Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction, and this Court entered its **Order** Postponing Decision on Jurisdiction and directed the filing of briefs on the merits.

SUMMARY OF THE ARGUMENT

The Florida Rules of Criminal Procedure are structured to assure that the time and place of an alleged offense are stated as definitely as possible so that the accused can prepare an adequate defense. Fla. R. **Crim. P. 3.140(d)(3)**.

Situations, however, may arise wherein the good-faith efforts of the State nevertheless result in a time-frame that on its face imposes an unreasonable burden upon the accused. The rules contemplate that the

trial court may exercise its "opinion" in such circumstances, Fla. Crim. P. 3.140(o), and grant an accused the remedy of dismissal when the State fails to establish a lack of prejudice to the defendant. Such a determination must be made on a case-by-case basis and, in the absence of an abuse of discretion, the judgment of the trial court should not be disturbed.

ARGUMENT

THE COURT OF APPEALS ERRED IN REQUIRING THAT THE ACCUSED ESTABLISH "SPECIFIC PREJUDICE" FROM **THE** TWENTY-SEVEN MONTH TIME-FRAME ALLEGED FOR THE OFFENSE. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOCATING THE BURDEN TO THE STATE TO SHOW A LACK OF PREJUDICE TO THE ACCUSED.

Two distinct rules protect the accused from overbreadth in charging instruments.

Rule 3.140(d)(3), Florida Rules of Criminal Procedure, provides:

(3) Time and Place. Each count of an indictment or information upon which the defendant is to be tried shall contain allegations stating as definitely as possible the time and place of the commission of the offense charged in the act or transaction or on two or more acts or transactions connected together, provided the court in which the indictment or information is filed has jurisdiction to try all of the offenses charged.

Rule 3.140(o), Florida Rules of Criminal Procedure, provides:

(o) Defects and Variances. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.

Read in pari materia, these two rules establish that: 1) the State must always make its allegations as definite as possible; and 2) circumstances may exist where such a good-faith effort by the State will nevertheless be insufficient to protect the right of the accused to a fair trial.

Petitioner's case is not one in which the State has failed in its responsibility to allege a time-frame as narrowly as possible. It was accepted below that twenty-seven months was the best that the State could do. (R. 37). **Rather**, this case concerns Rule 3.140(o) and the ability of Petitioner to present a defense, as well as his right to be **protected** from multiple prosecutions.

Despite the fact that Rule 3.140(o) addresses itself to the court's "opinion," and never employs the word "prejudice," the Fourth District Court of Appeal has put the burden of proving prejudice on Petitioner:

We discern no basis for concluding that a defendant's rights, under the rules or due process, are violated where the state in good faith has framed the time as narrowly as reasonably possible and the defendant has failed to demonstrate to the court's satisfaction that specific prejudice resulted.

592 So.2d at 341.

This inflexible reasoning by the Fourth District would validate any time-frame selected by the State -- be it five years, ten years or twenty years -- unless the accused established "specific prejudice." But what would such prejudice entail? Generally, prejudice would be found in the inability to establish a prospective alibi for single or multiple dates during the period of years. The inherent unfairness of such excessive time-frames has already been recognized when the offense is not charged as being continuous in nature. See, State v. Barnett, 344 So.2d 863, 865 (Fla. 2d DCA 1977).

The reasoning of **the** Fourth District only exacerbates this inherent unfairness, viz., the greater the time-frame, **the** greater the difficulty in raising a prospective alibi, and thus the unlikelihood of

establishing specific prejudice. This reasoning of the Fourth District therefore becomes self-fulfilling.

The rationale of the Fourth District also directly conflicts with the opinion of the Fifth District in Goble v. State, 535 So.2d 706 (Fla. 5th DCA 1988), which concluded that to permit the State to allege two counts of sexual battery as occurring sometime during a period of approximately **two** and one-half years would "eviscerate" our system of criminal jurisprudence. 535 So.2d at 707.

The Goble opinion is based upon the earlier opinion of the Fifth District in Knight v. State, 506 So.2d 1182 (Fla. 5th DCA 1987), which holds that permitting the State to allege sexual batteries over periods of three or four years violates the requirement of Rule 3.140(d)(3), supra, that the time of the offense be stated "as definitely as possible."

Because of the reference in Knight to Rule 3.140(d)(3), Knight and Goble might arguably be read as cases wherein the State had not made sufficient efforts to narrow the time-frame. However, nothing in those opinions points to such a defalcation by the State. **Rather**, each opinion can be read fairly as holding that the respective time-frames were impracticable as a matter of law and that prejudice to the **accused** would

be presumed under Rule 3.140(o).¹

This confusion appears consistent with the Fifth District's own interpretation of its opinions in Knight and Goble:

8. The state argues that Tingley v. State, 549 So.2d 649 (Fla.1989), approving Tingley v. State, 495 So.2d 1181 (Fla. 5th DCA 1986) overruled our prior decisions of Goble v. State, 535 So.2d 706 (Fla. 5th DCA 1988) and Knight v. State, 506 So.2d 1182 (Fla. 5th DCA 1987). Because of our holding, we are not required to address this argument, but we do note that Tingley involved an information where the offenses were set forth in time periods of less than a year and were amended by way of a subsequent bill of particulars which amended the dates of the offenses in time periods which were also less than one year. The court in Tingley held that this subsequent bill of particulars was not an impermissible amendment which voided the indictment. In Goble and Knight, the time periods of the offenses covered a substantial time interval far in excess of one year. In Goble, the time period was in excess of 2½ years and in Knight the time periods involved in two of the offenses were 4 years and over 3 years. A resolution of whether the stated time period is proper may turn on whether the state exhausts its ability to define actual or reasonably approximate dates with respect to when the offenses were cam-

This view is further supported by logic, as only Rule 3.140(o) sets out the remedy of dismissal, while Rule 3,140(d)(3) "averbreadth" would be curable by amendment or by particulars.

mitted unless the court can say with any degree of certainty that the defendant will not be "hampered in preparation of his defense." State v. Yzaguirre, 569 So.2d 492, 493 (Fla. 2d DCA 1990).

State v. Theriault, 590 So.2d 993, 995 n.8 (Fla. 5th DCA 1991) (emphasis added).

The operative words in the above quotation are "may" and "unless." The above quotation recognizes that despite the State's best efforts to narrow a time-frame the court may presume prejudice from such length of time unless the State shows the absence of such prejudice. Compare, Lavigne v. State, 349 So.2d 178, 179 (Fla. 1st DCA 1977) (State has burden of showing lack of prejudice to defendant from failure to follow discovery rules).

Assuredly, this safeguard for the accused will be found rarely, viz., in those cases where it is impracticable for the State to be more particular and where the length of time likewise makes it impracticable to show specific prejudice. Rule 3.140(o), supra, recognizes that such situations can occur, and thus permits the remedy of dismissal where the "opinion" of the court is that the accused will be unduly prejudiced in **his** defense. The use of the word "opinion" is equivalent to granting the trial court discretion in striking a balance between the interests and rights of the State

and those of the accused. Such decisions should only be reviewable for abuse of discretion, and no such abuse is supported by this record.

CONCLUSION

There having been no showing that the trial court abused its discretion, the decision of the Fourth District Court of Appeal should be reversed with instructions to reinstate the order of dismissal.

If, however, this Court agrees with the decision of the Fourth District, the cause should be remanded for an evidentiary hearing on the question of "specific prejudice."

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to ROBERT BUTTERWORTH, Attorney General, Tallahassee, Florida and JOHN KOENIG, JR., Asst. Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 2 day of April, 1992.



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