

047

IN THE SUPREME COURT OF FLORIDA

FILED

SD J. WHITE

MAR 15 1999

CLERK, SUPREME COURT

By _____
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

REPLY BRIEF OF PETITIONER

✓
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ARGUMENT IN REPLY

THE DISTRICT COURT OF APPEAL 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.

From the very first sentence of its brief, the State misconstrues the point of this appeal. The State's first sentence suggests that Petitioner seeks "a per se rule of dismissal in circumstances where the State can not narrow the time . . . to a period of time less than two and one-half years."

Petitioner has never argued for a "bright line" or per se rule. Rather, Petitioner has argued that Rule 3.140(o), Florida Rules of Criminal Procedure, grants the trial court the remedy of dismissal when it is of the opinion that the accused will be unduly prejudiced by a time-frame which is unreasonable on its face. Such a determination involves many factors, the most important of which is the nature of the offense (i.e., isolated or continuing in nature) and the types of defenses (e.g., self-defense, intoxication or mistake of fact) which might be available to that offense. Such a determination also includes whatever evidence or argument the State comes forward with to negate the threshold prima facie presumption of prejudice.

It is not a novel idea in the law for the nature of the offense to be considered in judicial determinations. It has long been recognized that time-frames may be stated **quite** liberally where an offense is continuing in nature. *e* State v. Barnett, 344 So.2d 863, 865 (Fla. 2d DCA 1977). It is far easier to recall a continuing conspiracy rather than a single theft, particularly where the accused is a thief.

It also appears reasonable for a court to consider the range of possible defenses which might be available for a particular offense. For example, the accused defendant would be hard-pressed to establish a defense of intoxication after a number of years, particularly if he had been intoxicated on numerous occasions during that period. But in such circumstances, he could not show "specific prejudice" without having some point of reference. By shifting the burden to the State, the State would still have the opportunity to show that the person rarely used intoxicants, thus negating a presumption of prejudice.

As argued in Petitioner's initial brief, the longer the time-frame involved, the less the likelihood that the accused can make a showing of specific prejudice. Rule 3.140(o) wisely permits the trial court to exercise its discretion in shifting the burden of proof on the question of prejudice.

Likewise, it is not a novel idea in the law to presume prejudice and thereby shift a burden to the State. As acknowledged by the brief of the State (at p. 15), such burden-shifting is utilized for discovery violations, and the State frequently meets its burden. Also, as discussed infra, "presumptive prejudice" is recognized in due process analysis when there has been prosecutorial delay. Rule 3.140(o) is far from novel.

Curiously, the brief of the State never acknowledges the very existence of Rule 3.140(o) **and** the informed discretion it gives to the trial court. Rather, the State cites a litany of cases concerning the requirement of Rule 3.140(d)(3) that the time of the alleged offense be stated as "definitely as possible." Those cases are irrelevant here. Rule 3.140(o) exists to remedy any injustice that may remain after Rule 3.140(d)(3) has been fully complied with.

Fairly viewed, the State argues for its own per se rule, viz., that if the time is stated as definitely as possible, no information can ever be dismissed. The time-frame can be alleged on two, five or fifty years. In short, if the State exercises good faith, it handcuffs the exercise of discretion under Rule 3.140(o).

The justification of the State **far** its interpretation (at p. 4) is that it will prevent "injustice, particularly where proof of a defendant's guilt is evident." Petitioner thought that his initial brief was clear in pointing out that the State could bring such matters to the attention of the trial court before the court exercised its Rule 3.140(o) discretion. If guilt were in fact "evident," that would establish that there is no defense to be prejudiced, and the exercise of discretion in favor of dismissing would therefore be an abuse of discretion. Of course, what is "evident" to the State is not always evident to the impartial observer.

The brief of the State (at 11-14) also interjects an argument by analogy and citation to a line of cases concerning pre-indictment or pre-arrest prosecutorial delay. These cases hold that due process is not offended when the burden is put on the defendant to show "actual prejudice" from a delay of two and one-half years, State v. Hills, 467 So.2d 845 (Fla. 4th DCA 1985); eight and one-half months, State v. Borges, 467 So.2d 375 (Fla. 2d DCA), petition for review denied, 476 So.2d 672 (Fla. 1985); thirteen months, Marrero v. State, 428 So.2d 304 (Fla. 2d DCA 1983); or sixteen months, Howell v. State, 418 So.2d 1164 (Fla. 1st DCA 1982).

But what the State omits is that these very same cases recognize that in addition to "actual" prejudice, there also exists "presumptive" prejudice from passage of time alone, Howell v. State, supra 418 So.2d at 1167 n.1, and that the federal courts have presumed prejudice in the due process context from delays of as little as fifteen months, id. at 1171 n.7. See also, State v. Bonamy, 409 So.2d 518, 519 (Fla. 5th DCA 1982). As explained in the cases cited by the State, such a finding of either presumptive or actual prejudice is the threshold required for the courts to turn to a balancing test and an examination of the reasons or motives for the delay.

The State has therefore established that courts, when making constitutional decisions, can and do presume prejudice from delays which appear to be prima facie unreasonable. There are no per se or "bright line" rules. Rather, what the courts engage in is a wide range of common-sense discretion.

Given this ability of the courts to recognize that which is unreasonable on its face in the due process context, it is not surprising that Rule 3.140(o) likewise recognizes **the discretion of trial** courts to acknowledge presumptive prejudice when it occurs. This is not a per se rule, but a rule of fairness, and Petitioner submits that Rule 3.140(o) should be

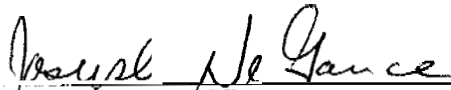
interpreted to eliminate unfairness to the accused to an even greater degree than does presumptive prejudice under the due process clause. If Rule 3.140(o) were meant to assure only minimal due process, there would have been no reason to even write the rule.

This Court should therefore take jurisdiction to resolve the various conflicts with the Goble decision and squarely reject the State's apparent argument that Rule 3.140(o) ceases to exist whenever there is a showing of compliance with Rule 3.140(d)(3).

CONCLUSION

The decision of the Fourth District Court of Appeal should be reversed with instructions to reinstate the order of dismissal properly entered by the trial court. If **the** Court nevertheless agrees with the opinion of the Fourth District, the cause still should be remanded for an evidentiary hearing on the question of "specific prejudice."

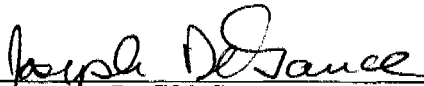
Respectfully submitted,


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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 to JOAN FOWLER, Senior Asst. Attorney General, and SARAH B. MAYER, Asst. Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 14 day of May, 1992.



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