

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

STEPHANIE WETHERELL,

Appellant,

vs.

Appeal No. CRC08-00039APANO
UCN No. ~~522007CT173774XXXXXX~~

STATE OF FLORIDA,

522008AP000039XXXXCR

Appellee.

_____ /

Opinion filed 5/25/10.

Appeal from the County Court
for Pinellas County
County Judge Donald E. Horrox

Peter A. Sartes, Esquire
Attorney for Appellant

Bernie McCabe, Esquire
State Attorney
Sixth Judicial Circuit of Florida
Attorney for Appellee

ORDER AND OPINION

PER CURIAM

This matter is before the Court on Defendant's appeal from the Judgment and Sentence of the Pinellas County Court. Defendant was charged and convicted of DUI. The focus of the appeal is the trial judge's order denying Defendant's Motion to Dismiss for failure to provide a speedy trial. (R 90) Defendant entered a no contest plea to the charges, reserving the right to appeal the denial of the Motion to Dismiss. (R 90-91). The

trial judge found that the ruling on the motion was dispositive. (R 96-97). This Court has jurisdiction.

In the case below, speedy trial expired. Defendant filed a notice of expiration of speedy trial. The trial judge set the case for trial within the 15 day recapture window. On the morning of trial, Defendant moved for a continuance to be charged to the State because the State provided discovery only the day before trial. The trial judge expressed sympathy to Defendant, but refused to charge the continuance to the State. The trial judge continued the trial and the 15 day recapture period expired. Defendant moved to dismiss for expiration of the speedy trial period. The trial judge denied the motion.

In considering this matter, the trial judge expressed understandable frustration with the application of the speedy trial rule. (R 48, 70) At the time of the hearing in the trial court, the decision in *State v. T.G.*, 990 So.2d 1183, 1184 (Fla. 3 DCA 2008), had not been issued. There the Court said: “[T]he general rule (that a defense continuance waives the benefit of the speedy trial period) has exceptions. In appropriate circumstances a defense continuance does not waive the speedy trial rule where there has been an inexcusable delay in providing discovery, or other violation of defense discovery rights.” The Court also distinguished the Second District decision in *State v. Gilliam*, 884 So.2d 128 (Fla. 2d DCA 2004), which was appropriately relied on by the State:

In *Gilliam*, defense counsel told the court that he had filed a notice of expiration of the speedy trial period in order to protect his client’s speedy trial rights, but he was unsure of his client’s whereabouts and was not requesting a trial. While the State had not provided certain discovery which had been requested, it is clear that the defense was not prejudiced in light of the fact that the attorney had not located his client. Under those circumstances, a discharge under the speedy trial rule was denied. The *Gilliam* case is not applicable here. 990 So.2d @ 1185.

Since the decision in *T.G.* is not inconsistent with any Second District decision, it is controlling. See e.g. *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992). So if the failure to provide timely discovery was inexcusable, the Motion to Dismiss should have been granted. Clearly, that is the situation in the instant case.

In arguing the matter in the trial court, the prosecutor candidly and properly acknowledged that the discovery was extremely late and there was no excuse for the failure to provide timely discovery. The Assistant State Attorney advised the trial judge:

They had discovery yesterday, Your Honor. It was filed yesterday and it was discovered to their office yesterday. *I'm not trying to say it was timely. I'm not trying to say anything to that effect, Your Honor. The discovery did get to them extremely late and the State (sic) has my apologies on that.* The moment I got the file, I began working on it and I got the discovery to them within four days of having -- or three days of having the file, Your Honor. (R57)

....

And again, I apologize for the discovery not being there within the 15 days and I -- not that this is any sort of -- any sort of an excuse, Your Honor. I will tell you that we did not receive the file from traffic court until Friday of last week. Monday was the first time I saw it and the first time I even knew there was a notice of expiration.... (R 61)

On Monday, I immediately began working to get discovery and to get my witnesses ready and get the maintenance packs for the DUI. I -- we received the police report finally on Wednesday afternoon. At that point, I contacted Ms. St. Clair and I informed her that I have the police report. I'm going to get the discovery done today and I'm going to get it over to your office. And I did that, Your Honor.

Yesterday evening we picked up the maintenance pack from central breath testing, and I discovered her that this morning. I made every effort to try to get this discovery to her as quickly as possible as soon as I got the file. *I know that's no excuse because 150 days did elapse, but I just want to apologize, you know, on the record now for that failure.* I don't think the notice of expiration is the proper way to get the discovery though Your Honor. (R 61-62) (emphasis added)

ACCORDINGLY, this Court REVERSES the trial court's order denying the Motion to Dismiss and remands this cause with instructions that the Appellant be discharged.

ORDERED in Wetherell v. State (Appellate Court No. CRC 08-00039APANO) at Pinellas County, Florida this 25th day of May, 2010.

Original order entered on May 25, 2010 by Circuit Judges David A. Demers, Thane B. Covert, and Chris Helinger.

Copies to:

County Judge Donald E. Horrox

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