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

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

STATE OF FLORIDA,
Appellant,

v.

BRIAN PATRICK NEAL,
Appellee.
_____/

UCN: 512018AP000043APAXWS
Appeal No.: 18-AP-43
L.T. Case No.: 17-MM-4899

On appeal from Pasco County Court,
Honorable Debra Roberts

Michael L. Garcia,
Assistant State Attorney,
for Appellant,

Thomas McLaughlin, Esq.,
for Appellee.

ORDER AND OPINION

Because the Appellant did not properly preserve for appellate review the argument that the Pasco County Complaint Affidavit was a valid Notice to Appear, the Court must affirm the trial court's finding that no valid charging document was filed prior to the expiration of the speedy trial period. However, because the waiver of speedy trial in this case was valid regardless of whether the trial court had subject-matter jurisdiction, the order of the trial court granting the Appellee's motion for discharge is reversed.

STATEMENT OF THE CASE AND FACTS

On September 3, 2017, a law enforcement officer issued a Pasco County Complaint Affidavit ("PCCA") alleging that the Appellee had committed Battery and Criminal Mischief. On September 13, 2017, case number 17-MM-4899 was created and the PCCA was filed and treated by the Appellant as a Notice to Appear ("NTA"), a formal

charging document. *See* Fla. R. Crim. P. 3.125. Per a court event form[1], during arraignment on November 28, 2017, the Appellee waived speedy trial. On May 14, 2018, the Appellee filed a Motion for Discharge. On June 8, 2018, the date of the motion hearing, the Appellant filed a written Misdemeanor Information charging the Appellee with Battery and Criminal Mischief.

Motion for Discharge

In his motion for Discharge, the Appellee asserted that he was arrested on September 3, 2017. He further asserted that the PCCA was not sufficient to function as an NTA because it failed to provide the time and place that the accused is to appear in court, failed to provide the name and address of the trial court having jurisdiction to try the offense charged, and it was not sworn to by the issuing officer before a notary public or deputy clerk which is required on the two NTA copies to be filed with the Clerk. *See* Fla. R. Crim. P. 3.125(a); (d); (g)(5); (g)(6).

The motion argued that because the PCCA was not a valid NTA, no formal charge had been filed by the time the speedy trial deadline passed on December 2, 2017. He argued that he was entitled to immediate discharge without the benefit of the recapture period on the authority of *State v. Williams*, 791 So. 2d 1088, 1091 (Fla. 2001) ("the State may not file charges based on the same conduct after the speedy trial period has expired") and *State v. Clifton*, 905 So. 2d 172, 176 (Fla. 5th DCA 2005) ("The State may not circumvent the purpose and intent of the speedy trial rule by . . . taking no action after the defendant is arrested and waiting until after the speedy trial period has expired to file formal charges. In these instances, the State has essentially abandoned the prosecution and the recapture provisions of the rule do not apply, with the result that the defendant must be discharged.").

Hearing on Motion for Discharge

The hearing on the motion was held on June 8, 2018. The Appellee argued that "the notice to appear while insufficient was cured today, this morning with the filing of the Information. The arraignment was November 28th, 2017, which is inside the speedy trial

[1] A court event form filed by the trial court with the Clerk of the Court is part of the record on appeal. See Fla. R. App. P. 9.200(a)(1) ("Except as designated by the parties, the record shall consist of all documents filed in the lower tribunal . . ."); *Landry v. Charlotte Motor Cars, LLC*, 226 So. 3d 1053, 1054 n.1 (Fla. 2d DCA 2017) ("The facts stated in this opinion are drawn from the . . . court minutes . . . in the record").

expiration date of December 2. And because there was a waiver of speedy at arraignment, that speedy trial rule doesn't apply in this case because the Defense affirmatively waived it and so giving the State time to file an Information to cure the intake deficiencies, which was done this morning."

Order Granting Motion for Discharge

The trial court verbally granted the Motion for Discharge. On June 12, 2018, the trial court issued a written order writing:

> This case is dismissed as no formal charge was filed within the 90-day misdemeanor speedy trial window. Under Fla. R. Crim. P. 3.191(p), *State v. Williams*, 791 So. 2d 1088, 1091 (Fla. 2001), and *State v. Clifton*, 905 So. 2d 172, 176 (Fla. 5th DCA 2005), defendant is immediately and permanently discharged from the crime alleged.

The Appellant timely-filed a Notice of Appeal on June 21, 2018.

STANDARD OF REVIEW

The issue under review "involves the interpretation of the rules of procedure with regard to the right to a speedy trial and is therefore a question of law subject to *de novo* review by this Court." *State v. Nelson*, 26 So. 3d 570, 573-74 (Fla. 2010).

LAW AND ANALYSIS

Appellant's First Contention of Error

The Appellant first argues that the trial court's order should be reversed because the PCCA was a valid, if defective NTA that formally charged the Appellee with Battery and Criminal Mischief and therefore the Appellant filed a formal charge prior to the expiration of speedy trial. The Court finds that the Appellant did not properly preserve this argument for review.

To properly preserve an issue for appellate review, the following must be done: "First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Harrell v. State*, 894 So. 2d 935, 939-40 (Fla. 2005) (quoting *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)). *See also State v. Szempruch*, 935 So. 2d 66, 68 (Fla. 2d DCA 2006).

In *Szempruch*, the defendant and the State entered into a negotiated plea agreement. After sentencing, the defendant filed a motion to mitigate his sentence. The

postconviction court held a hearing on the motion after which that court reduced the defendant's sentence. *Id*. at 67. On appeal, the State argued for the first time that (1) the postconviction court erred in modifying the sentence because the original sentence was imposed pursuant to a plea agreement and (2) the defendant failed to present sufficient evidence below to support a downward departure sentence. *Id*. The Second District Court of Appeal affirmed the trial court but wrote that had the State actually made those arguments before the trial court, the issues would have been preserved and the Second District would have been compelled to reverse the trial court's order granting the motion. *Id*. at 68-69.

In the instant case, rather than argue below that the PCCA was a valid NTA, the Appellant merely stated that the PCCA was "insufficient" and then went on to argue that any insufficiency was cured by the filing of the written Misdemeanor Information and that the Information was timely and proper because the Appellee waived speedy trial at arraignment within the speedy trial period. Therefore, this Court must affirm the trial court's finding that no charging document was filed prior to the expiration of speedy trial.

Appellant's Second Contention of Error

The only argument in this appeal that was both properly preserved below and raised before this Court in the Initial Brief is that the trial court erred in granting the Appellee's motion for speedy trial discharge because the Appellee waived speedy trial before the expiration of the speedy trial period. Therefore, it does not matter that no formal charging document was filed until after the expiration of the speedy trial period and discharge was inappropriate.

The court event form for the arraignment on November 28, 2017 shows that the Appellee waived speedy trial. However, the Appellee argued below that the waiver of speedy trial was not valid because without a formal charging document, the trial court did not have subject-matter jurisdiction at the time that speedy trial was waived.

While we could find no case law directly addressing the Appellee's subject-matter jurisdiction argument, there is dicta in several Florida appellate cases indicating that the Appellee's waiver of speedy trial was valid despite the trial court's lack of subject-matter jurisdiction. *See Bulgin v. State*, 912 So. 2d 307 (Fla. 2005); *Griggs v. State*, 994 So. 2d 1198 (Fla. 5th DCA 2008); *Williams v. State*, 757 So. 2d 597 (Fla. 5th DCA 2000).

In *Williams*, the defendant was arrested after a controlled drug buy of cocaine. The defendant agreed to act as an informant and was released by law enforcement. After he was arrested again and charged with the same offense for which he was initially arrested, the defendant moved for speedy trial discharge because no formal charges had been filed within the speedy trial period. *Id*. at 598. The Fifth District granted the motion and noted that because no court proceedings were ever scheduled and a trial date was never set, Williams could not be considered "unavailable" for trial within the meaning of the speedy trial rule. *Id*. at 600. The *Williams* court further noted the State's argument that the defendant should be estopped from claiming speedy trial protections because he was free following his release was unavailing and that if the State was concerned about speedy trial, "it could *merely obtain a waiver from the defendant*, as part of his substantial assistance agreement." *Id*. (Emphasis added.)

In *Bulgin*, the Florida Supreme Court affirmed Fifth District in *Williams* and reversed the First District in *Bulgin* and wrote that the result would likely have been different had the defendants in these cases waived speedy trial as part of their cooperation agreements. *Id*. at 311-12 ("[the State] has the responsibility to take the [speedy trial] rule into account, including the obvious option of including a waiver of speedy trial in the cooperation agreement . . . We simply conclude that if the defendants are to waive their speedy trial rights there must be some more explicit action or evidence of intent to do so . . .").

In *Griggs*, the defendant was arrested by law enforcement for possession of methamphetamine and taken to "a police building" on April 19, 2005. While being interviewed, the defendant agreed to act as a confidential informant and was released. Several days later, the defendant "declined to act as a confidential informant." *Id*. at 1199. An Information was not filed until August 23, 2006. *Id*. at 1200. The Fifth District, citing *Bulgin*, held that because law enforcement had not obtained a waiver of speedy trial as part of the agreement to cooperate on April 19, 2005, the speedy trial period had run prior to the filing of the Information and the defendant was entitled to immediate discharge. *Id*. at 1199, 1200. These courts' dicta regarding what would have happened if waivers of speedy trial had been obtained were presumably written knowing that these waivers of speedy trial would have occurred in situations where no court had subject-matter

jurisdiction at the time the waivers occurred.

In the case at bar, the Appellee waived speedy trial at arraignment. That the trial court did not have subject-matter jurisdiction at that time did not matter. If it did matter, then the Florida Supreme Court and the Fifth District Court of Appeal would not have written that waivers of speedy trial would have prevented speedy trial discharge in *Williams*, *Bulgin*, and *Griggs* because those waivers were also made before a trial court had subject-matter jurisdiction.

Additionally, by waiving speedy trial prior to the expiration of the speedy trial period, and waiving it in front of a trial court that the Appellee then believed to have subject-matter jurisdiction, the Appellee is estopped from later claiming that there was no waiver of speedy trial as a basis for speedy trial discharge. Because the Appellee expressly waived speedy trial before a trial court it believed at the time had subject-matter jurisdiction, and because the waiver occurred prior to the expiration of the speedy trial period, the trial court should not have granted the Appellee's motion for discharge. *See State v. Nelson*, 26 So. 3d 570, 576 (Fla. 2010) ("This waiver is construed as an ongoing waiver of speedy trial rights as to all charges which emanate from the same criminal episode, including any newly filed charges arising out of the incident").

CONCLUSION

Because the Appellant did not preserve the argument below, this Court must affirm the trial court's finding that the Pasco County Complaint Affidavit was not a formal charging document. However, Appellee expressly waived speedy trial prior to the expiration of the speedy trial period and therefore the trial court erred in granting the Appellee's motion for discharge. The trial court's order is reversed.

It is ORDERED AND ADJUDGED that the order of the trial court is hereby REVERSED. The cause is REMANDED for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ____ day of _____, 2019.

Original Order entered on May 21, 2019, by Circuit Judges Daniel D. Diskey, Linda Babb, and Susan Barthle.

Copies to:

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