

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2008

ANDREW NELSON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Nos. 4D08-1751 and 4D08-1753

[September 3, 2008]

WARNER, J.

The petitioner seeks to prohibit the trial court from continuing his prosecution in two separate cases based upon the right to a speedy trial discharge. The state claims that he waived his rule-based speedy trial rights by moving for a continuance in his first-filed juvenile case arising out of the same criminal episode. Because his motion for continuance occurred after the speedy trial time period had already run, we conclude that it did not have the effect of waiving his right to discharge. As both of his adult cases were either filed or re-filed after the expiration of the adult speedy trial time period, we grant the petitions and order petitioner's discharge.

Petitioner was arrested on May 16, 2007, when an officer stopped his vehicle and discovered weapons in the trunk and two pistols in petitioner's pockets. The probable cause affidavit listed the violations as armed burglary and carrying a concealed weapon. On June 6, 2007, the state filed a petition for delinquency, charging petitioner with grand theft of the two pistols found on his person and with carrying a concealed firearm. The ninety-day juvenile speedy trial period of Florida Rule of Juvenile Procedure 8.090(a) expired on August 13, 2007. However, the case was called for trial on August 15, 2007, at which time petitioner's counsel requested a continuance—**after** the expiration of the juvenile speedy trial period.

The 175-day adult speedy trial period for the charges ran on November 6, 2007. Three days later, on November 9, 2007, the state direct filed an information in felony court charging petitioner with one

count of armed burglary of a dwelling and twelve counts of grand theft of various firearms (case no. 07-22153). The information alleged that this occurred on May 5, 2007, although the state contended that this was a typographical error and that the burglary actually occurred on May 15, 2007.

The state filed a nolle prosequi of the juvenile petition on November 27, 2007, and on December 6, 2007, it filed a felony information charging the exact same counts of grand theft and carrying a concealed firearm as were contained in the juvenile petition, alleging the offense date of May 16, 2007 (case no. 07-23487).

On March 3, 2008, petitioner filed a motion for discharge in case no. 07-22153, the armed burglary and theft charges, and on March 6, 2008, he filed a similar motion for discharge as to the theft and concealed firearm charges, case no. 07-23487.

The trial court held hearings on both motions and denied them, finding the defense continuance, which had been taken **after** expiration of the speedy trial time in the juvenile case, waived speedy trial for all charges arising from the same criminal episode. From this order, petitioner filed a petition for writ of prohibition in each case, seeking to prohibit his further prosecution. We consolidated both petitions for the purposes of this opinion. We grant the petitions.

The trial court determined that petitioner's motion to continue the juvenile proceeding after the juvenile speedy trial period ran constituted a waiver of speedy trial for all charges. We disagree. A request for a continuance after a speedy trial period has run but before moving for discharge does not affect a defendant's right to demand his speedy trial rights. *State v. Leslie*, 699 So. 2d 832 (Fla. 3d DCA 1997). In *Leslie*, the state did not file the information until 177 days after Leslie's arrest. Although Leslie's attorney requested a continuance of the trial for purposes of taking discovery after the filing of the information but before moving for discharge, the Third District held that the request for continuance **after** the expiration of the speedy trial period did not affect the defendant's right to seek discharge. *See also Von Waldner v. State*, 860 So. 2d 1061 (Fla. 5th DCA 2003); *Ryan v. State*, 768 So. 2d 19 (Fla. 3d DCA 2000).

In *Stewart v. State*, 491 So. 2d 271, 272 (Fla. 1986), the court explained the rule as follows: “[W]hen a defendant requests a continuance *prior to the expiration of the applicable speedy trial time period for the crime with which he is charged*, the defendant waives his

speedy trial right as to all charges which emanate from the same criminal episode.” (emphasis supplied). The speedy trial time for the crime with which the petitioner was charged was the juvenile speedy trial time period, and petitioner did not request a continuance until *after* the period had expired. Thus, the continuance had no effect on the running of the speedy trial time for the juvenile proceeding, nor did it waive his speedy trial right as to any other charges emanating from the same criminal episode.

If the continuance has no effect, we must next consider whether the filing of the juvenile petition as to two charges affects the later filing of the adult charges. Both the state and the petitioner appear to agree that all charges arose from the same criminal episode, that is, the armed burglary and theft of the guns from the home of the victim.

In case no. 07-22153, the armed burglary and grand theft charges, the charges were filed after the expiration of the speedy trial period. Fla. R. Crim. P. 3.191(a). Where charges are not filed until after the speedy trial period runs, the state is not entitled to the recapture period of the rule, and the defendant is entitled to discharge. *State v. Williams*, 791 So. 2d 1088 (Fla. 2001). Even if the filing of the juvenile petition could be considered the initiation of charges which the state could amend (a point we need not decide), the adult charges of armed burglary and the various firearms found in the truck are new and different from the charges in the juvenile petition. Precedent dictates that, absent waiver of speedy trial rights, the defendant is entitled to discharge from any new charges arising from the same criminal episode filed after the expiration of the speedy trial period. *State v. D.A.*, 939 So. 2d 149, 151 (Fla. 5th DCA 2006); *State v. Clifton*, 905 So. 2d 172, 178-79 (Fla. 5th DCA 2005); *Pezzo v. State*, 903 So. 2d 960, 962 (Fla. 1st DCA 2005) (“[A]lthough the state may amend an information after the speedy trial time expires, the state may not . . . then amend[] an existing information in such a way that results in the levying of *new* charges (if those new charges arise from the same facts and circumstances giving rise to the original charge).”). Whether these charges are considered the original initiation of proceedings or an amendment to the original juvenile filing, they are new charges filed after the expiration of the speedy trial period, and petitioner is entitled to discharge without the recapture period.

As to case no. 07-23487, the speedy trial period ran on August 13, 2007. Petitioner did not file a motion for discharge. Had he done so the state would have been entitled to the recapture period to bring him to trial. See Fla. R. Juv. P. 8.090(m). Instead, the state nolle prossed the juvenile charges on November 27, 2007, and then refiled adult charges

on December 6, 2007. Because the state filed the nolle prosequere, and the speedy trial period had already expired, it was not entitled to refile charges based upon the same conduct after the period expired. *See State v. Agee*, 622 So. 2d 473, 475 (Fla. 1993). Petitioner is likewise entitled to discharge on the charges in case no. 07-23487 without observance of the recapture period.

There is some reference in the record that the state was awaiting DNA testing before it could charge the petitioner with the armed burglary. It could have requested an extension of the speedy trial period under Florida Rule of Criminal Procedure 3.191(i) & (l) if it had used diligent efforts to obtain the evidence but could not secure it. However, it did not do so, and we are left with no choice but to observe the dictates of the rule.

The petitions are granted, and the case is remanded with directions to discharge the petitioner.

GROSS and HAZOURI, JJ., concur.

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Consolidated petitions for writ of prohibition to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy, III, Judge; L.T. Case Nos. 07-23487 CF10A and 07-22153 CF10A.

Lorena Valenzuela of Law Firm of Glantz & Glantz, P.A., Plantation, for petitioner.

Bill McCollum, Attorney General, Tallahassee, and Thomas A. Palmer, Assistant Attorney General, West Palm Beach, for respondent.

Not final until disposition of timely filed motion for rehearing.