

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

[November 19, 2008]

***ON MOTION FOR REHEARING***

WARNER, J.

In its motion for rehearing, the state cites to us *State v. Naveira*, 873 So. 2d 300 (Fla. 2004), which it did not include in its original response. We deny the motion, as we do not think that *Naveira* changes our opinion but we certify a question to the supreme court as one of great public importance.

In *Naveira* the state filed its information charging the defendant with sexual battery on the 175th day after the defendant's arrest. Five days later the defendant filed a notice of expiration of the speedy trial time under Florida Rule of Criminal Procedure 3.191(p)(2). Two days later the trial court held a hearing on the notice of expiration, and at the hearing the state requested that the trial be set the following week. Defense counsel argued that he could not be ready, but the court set the trial. Naveira then moved for a continuance of the trial, arguing that it should be charged to the state. The trial court granted the motion for continuance and charged it to the state. Later it granted Naveira's motion for discharge under the speedy trial rule. The case was appealed twice. See *State v. Naveira*, 768 So. 2d 1254 (Fla. 1st DCA 2000); *State v. Naveira*, 807 So. 2d 766 (Fla. 1st DCA 2002). In the second appeal, the First District upheld the discharge under the speedy trial rule.

In its opinion, the supreme court quashed the opinion of the First District upholding the defendant's discharge. *State v. Naveira*, 873 So. 2d 300 (Fla. 2004). The court noted that rule 3.191 governs only the

time for bringing a defendant to trial, not the time for filing a charging document. The court adhered to its prior holding that a state cannot charge the defendant after the speedy trial period expires. See *State v. Williams*, 791 So. 2d 1088 (Fla. 2001). However, it then explained that under the rule the defendant is not entitled to an automatic discharge. Instead, the rule provides that the defendant may invoke the recapture provisions of rule 3.191(p), which then impose deadlines upon the trial court and the state to bring the case to trial. The trial court must hold a hearing on the notice within five days, and the defendant must be brought to trial within ten days of the hearing on the notice, *unless* one of the grounds in rule 3.191(j) exists to excuse compliance with the rule. One of those reasons is the unavailability of the defendant under rule 3.191(k). That rule provides, in part: “A person is unavailable for trial if . . . the person or counsel is not ready for trial on the date trial is scheduled. A person who has not been available for trial *during the term provided for in this rule* is not entitled to be discharged.” (emphasis supplied).

The court applied these rules to Naveira. It noted that the state was required to bring him to trial within 175 days of his arrest. The state filed its information on the 175th day. Naveira then invoked the rule by filing his notice of expiration. When the trial court and the state complied with the recapture period by holding the hearing within five days and setting the trial thereafter within ten days, Naveira filed a motion for continuance. The court held that Naveira was not ready for trial on the date trial was scheduled and requested a continuance. Therefore under rule 3.191(k) he was unavailable and not entitled to be discharged.

The court noted that the rule-based right to speedy trial was “not coextensive with the broader *constitutional* right to a speedy trial.” *Naveira*, 873 So. 2d at 308. It relied on the language of the rule itself to conclude that the rule-based speedy trial right was not violated in Naveira’s case.

While the state posits that *Naveira* stands for the proposition that any post-speedy trial expiration motion for continuance by a defendant waives his or her rights under the rule, we are not certain *Naveira* goes that far. Naveira invoked the “notice of expiration” and thus the state’s very limited right of recapture. Those provisions invoke specific deadlines, and a request for continuance once a defendant has insisted upon his rule-based speedy trial rights constitutes a waiver of those rights. See also *State v. Gilliam*, 884 So. 2d 128 (Fla. 2d DCA 2004).

Here, however, Nelson had not invoked the notice of expiration. He moved for a continuance of a trial scheduled *beyond* the speedy trial period. The supreme court in *Naveira* relied on the defendant's unavailability to justify its result. The rule requires that a person be unavailable *during the term provided for in this rule*. There is no showing that the defendant was unavailable during the ninety-day term of the rule, and since no notice of expiration had been filed, there was no showing of unavailability during the right of recapture period which briefly extends the "term" of the rule. Thus, in this case the motion for continuance of the trial filed after the speedy trial term expired but before any notice of expiration was filed has no effect.

We also reach this conclusion based on *Stewart v. State*, 491 So. 2d 271, 272 (Fla. 1986), which holds, as set forth in our majority opinion, that "when 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 added). *Naveira* did not discuss *Stewart*, and the court has warned us that it does not overrule its prior precedent sub silentio. See *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). We thus must harmonize both holdings, which we have done in this opinion, by concluding that a motion for continuance is a nullity when filed after the speedy trial period has expired but before the notice of expiration invokes the right of recapture. See *State v. Leslie*, 699 So. 2d 832 (Fla. 3d DCA 1997).

Nevertheless, we are sufficiently unsure of the extent of the *Naveira* holding on post-expiration waivers of the speedy trial rule and whether the court would recede in part from its holding in *Stewart* based upon *Naveira* that we certify a question of great public importance to the court:

DOES A MOTION FOR CONTINUANCE MADE AFTER THE EXPIRATION OF THE SPEEDY TRIAL PERIOD BUT BEFORE A DEFENDANT FILES A NOTICE OF EXPIRATION UNDER THE RULE, WHICH ACTIVATES THE RIGHT OF RECAPTURE PERIOD, WAIVE A DEFENDANT'S SPEEDY TRIAL RIGHTS UNDER THE RULE?

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.

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