FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

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| VICTOR ORTIZ-LOPEZ,<br><br>Appellant,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>Appellee. | ) | Case No. 2D18-4910 |

Opinion filed November 18, 2020.

Appeal from the Circuit Court for Lee County; Nicholas R. Thompson, Judge.

Howard L. Dimmig, II, Public Defender, and Tim Bower Rodriguez, Special Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and William Stone, Jr., Assistant Attorney General, Tampa, for Appellee.

VILLANTI, Judge.

Victor Ortiz-Lopez appeals his convictions and sentences for false imprisonment, battery, and grand theft motor vehicle, arguing that he was improperly tried, convicted, and sentenced in violation of his right to a speedy trial. Because the

trial court erred in denying Ortiz-Lopez's motion for discharge on speedy trial grounds, we reverse his convictions and sentences and remand for his immediate discharge.

The offenses at issue occurred on October 8, 2017, when Ortiz-Lopez became involved in a dispute with his girlfriend in Lee County. The State issued a Lee County arrest warrant for Ortiz-Lopez based on the events of October 8 on January 23, 2018.

On February 2, 2018, Ortiz-Lopez was arrested in Hillsborough County on the outstanding Lee County warrant. The Hillsborough County Criminal Report Affidavit (CRA), which was signed on February 2, 2018, was filed with the Lee County court on February 13, 2018. That CRA clearly showed that Ortiz-Lopez was arrested on an "out of county warrant," it listed the three offenses that were identified in the Lee County arrest warrant along with the Lee County warrant number, and it stated that his arrest was pursuant to "Lee County S.O. warrant." Following proceedings on a violation of probation charge in Hillsborough County, Ortiz-Lopez was transported to Lee County on July 23, 2018, and he had his first appearance on July 24, 2018. However, as of that date, the State had still not filed an information against Ortiz-Lopez based on the October 8, 2017, incident.

On August 9, 2018, Ortiz-Lopez placed into the hands of Lee County jail officials his pro se "Motion for Dismissal of Speedy Trial." In this pro se motion, Ortiz-Lopez contended that the speedy trial period for the October 8, 2017, charges had expired based on his arrest on the Lee County warrant in Hillsborough County on February 2, 2018, and that he was therefore entitled to dismissal of the charges and an immediate discharge from jail. For reasons not apparent from the record, this motion

was not received and docketed by the court until August 20, 2018. Also on August 20, 2018, the State for the first time filed an information against Ortiz-Lopez arising from the October 8, 2017, incident.

On August 23, 2018, the trial court held the first of three hearings it would ultimately hold on Ortiz-Lopez's motion for discharge. At the August 23 hearing, the trial court stated that it was addressing Ortiz-Lopez's "notice of expiration of speedy trial," presumably filed under Florida Rule of Criminal Procedure 3.191(p). The trial court then conducted a Faretta[1] hearing on the issue of whether Ortiz-Lopez wanted to have counsel appointed. After an extended colloquy, Ortiz-Lopez stated that he would like to have counsel appointed but that he did not want to forego his speedy trial rights because of any appointment. The trial court ended the hearing by appointing counsel for Ortiz-Lopez, setting another hearing for August 30, and telling Ortiz-Lopez that he should discuss the speedy trial issue with counsel.

On August 30, 2018, Ortiz-Lopez again appeared for a hearing on his motion for discharge, this time with counsel. At that hearing, counsel advised the court that she was not prepared for a hearing on a motion for speedy trial discharge that day, that she could be ready for such a hearing on Tuesday, September 4, but she would not be prepared for trial on September 4. In response, the State argued that Ortiz-Lopez's pro se motion should be considered a "demand for speedy trial" under rule 3.191(b), which starts a sixty-day clock for the recapture period, rather than a "notice of expiration" under rule 3.191(p), which starts a ten-day clock. Under that reasoning, the State argued that speedy trial would not expire until sometime in October. Because

[1]Faretta v. California, 422 U.S. 806 (1975).

Ortiz-Lopez's counsel had not yet had time to review the issues and speak with him in detail, the trial court set another hearing for September 4 and, in an abundance of caution, set trial for September 5, which it determined would be the final day of the recapture period if Ortiz-Lopez's motion was treated as one filed on August 20, 2018, under rule 3.191(p).

On September 4, the parties appeared for the rescheduled hearing. At that hearing, Ortiz-Lopez argued through counsel that he was arrested in Hillsborough County on the Lee County arrest warrant on February 2, 2018, and that, based on the date of that arrest, the speedy trial period had expired on July 27, 2018. Counsel pointed the court to the Hillsborough County CRA filed in the Lee County case on February 13, 2018, which specifically stated that Ortiz-Lopez had been arrested on the Lee County warrant and was being held on such. Counsel argued that Ortiz-Lopez's motion for dismissal, which he had placed in the hands of prison officials on August 9, 2018, should be deemed to have been filed on that date under the mailbox rule. See Haag v. State, 591 So. 2d 614, 617 (Fla. 1992) (adopting the mailbox rule articulated by the Supreme Court in Houston v. Lack, 487 U.S. 266 (1988), which provides that "a petition or notice of appeal filed by a pro se inmate is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state," which is generally "when the inmate places the document in the hands of prison officials"). On that basis alone, counsel contended that the ten-day recapture period provided in rule 3.191(p)(3) had already expired and thus that Ortiz-Lopez was entitled to an immediate discharge. Neither Ortiz-Lopez nor counsel argued any other basis for his immediate discharge.

In response, the State argued that Ortiz-Lopez's arrest in Hillsborough County was based on independent Hillsborough County charges and that he was not arrested on the Lee County warrant until July 23, 2018, when he was returned to Lee County. Therefore, the State contended that the speedy trial period had not yet expired and any discussion of the recapture period was moot. The trial court took the matter under advisement, left the case set for trial the next day, and advised the parties that it would provide its ruling at that point.

The next morning, the trial court denied Ortiz-Lopez's motion for discharge due to speedy trial violation, finding that his motion was not an effective invocation of his speedy trial rights under either rule 3.191(b) or 3.191(p) because it did not include the proper title required under either subsection of the rule—an argument not made by the State at any of the hearings. The court also ruled that any delay in bringing Ortiz-Lopez to trial was due to his request for counsel at the August 23, 2018, hearing—a ruling that flatly conflicts with Ortiz-Lopez's statement on the record that he did not want counsel appointed if it would affect his right to a speedy trial. In making its ruling, however, the trial court specifically found that Ortiz-Lopez had been arrested on the Lee County warrant on February 13, 2018.

Once his motion for discharge was denied, Ortiz-Lopez told the court that he wanted to proceed pro se because appointed counsel was unprepared for trial. The court held a lengthy Faretta hearing, after which it permitted Ortiz-Lopez to represent himself. Trial then commenced, but it resulted in a mistrial. The State timely retried Ortiz-Lopez on November 20, 2018, see rule 3.191(m) (requiring a retrial within ninety days of a mistrial if speedy trial has been invoked), and the jury found him guilty as

charged. Ortiz-Lopez contends that he is entitled to have these convictions, and the ensuing sentences, reversed because his trial was held in violation of his right to a speedy trial.

Resolution of this case is governed by the supreme court's decision in State v. Williams, 791 So. 2d 1088, 1091 (Fla. 2001), in which the court held:

> [T]he speedy trial time begins to run when an accused is taken into custody and continues to run even if the State does not act until after the expiration of that speedy trial period. The State may not file charges based on the same conduct after the speedy trial period has expired.

Further, in such circumstances, the State is not entitled to any recapture period. Id.; see also State v. McCullers, 932 So. 2d 373, 375-76 (Fla. 2d DCA 2006) (citing the rule from Williams but distinguishing its holding because the State in Williams had timely filed the charges even though the defendant was not arraigned until after the speedy trial period had expired); Walden v. State, 979 So. 2d 1206, 1207 (Fla. 4th DCA 2008) (granting writ of prohibition and quashing order permitting State to proceed on charges not filed until after the speedy trial period had expired and noting that no recapture period was permitted under those circumstances). Essentially, if the State fails to file charges within 175 days of a defendant's arrest, the State loses its ability to ever prosecute the defendant for those charges.

Here, the record clearly shows that Ortiz-Lopez was arrested on the Lee County warrant on February 2, 2018. Based on that date, the 175-day speedy trial period for those charges expired on July 27, 2018. Further, even if the applicable date was the February 13, 2018, date on which the Hillsborough County CRA was filed in Lee County, the 175-day speedy trial period expired on August 13, 2018. However, the

State did not file an information against Ortiz-Lopez until August 20, 2018. By failing to file an information against Ortiz-Lopez until after the speedy trial period had expired, the State lost the ability to prosecute him for those charges, and it was not entitled to any recapture period. Therefore, the trial court should have granted Ortiz-Lopez's motion for discharge.[2]

In this appeal, the State argues that the trial court's finding that Ortiz-Lopez was arrested on the Lee County warrant on February 13, 2018, was "incongruous." The State points to the July 24, 2018, entry in the clerk's docket showing that the Lee County warrant was "Returned Served and Filed" on that date.

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[2]We recognize that Ortiz-Lopez's counsel did not argue in the trial court that Ortiz-Lopez was entitled to immediate discharge based on the holding in Williams. Moreover, because the speedy trial rule is not self-executing, Ortiz-Lopez was required to "take affirmative action to avail him- or herself of the remedies afforded under the [speedy trial] rule," including filing a motion that seeks the appropriate remedy. State v. Nelson, 26 So. 3d 570, 574 (Fla. 2010); State v. Burgess, 153 So. 3d 286, 288 (Fla. 2d DCA 2014). Here, while Ortiz-Lopez arguably sought the proper remedy, i.e., immediate discharge, he did so based on a completely different legal argument than that articulated in Williams. Thus, it does not appear that the Williams argument was properly preserved for appellate review. See Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." (emphasis added) (citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982))). Despite this omission, Ortiz-Lopez is entitled to relief if the failure to raise the Williams argument resulted from ineffectiveness of counsel apparent on the face of the record, which arises when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable. See Corzo v. State, 806 So. 2d 642, 645 (Fla. 2d DCA 2002) (citing Stewart v. State, 420 So. 2d 862 (Fla. 1982), and Ross v. State, 726 So. 2d 317, 318 (Fla. 2d DCA 1998). Here, counsel's failure to bring the rule set out in Williams to the trial court's attention is apparent on the face of the record, the prejudice caused by this failure is indisputable, and there is no conceivable tactical reason for permitting the State to go forward on charges that should have been dismissed on speedy trial grounds. Hence, we elect to consider this argument either on the basis that Ortiz-Lopez sought the proper remedy (albeit for the incorrect reason) or on the basis of ineffective assistance of counsel apparent on the face of the record.

However, this argument ignores the February 13, 2018, entry in the same docket which shows that the Hillsborough County CRA was filed on that date, and the CRA clearly indicates that Ortiz-Lopez was both arrested on and being held on the Lee County warrant as of that date. The legal effect of a document filed in the court file is governed by its contents, not by the title given the document by the clerk's office personnel. Hence, the fact that the clerk's docket entry refers to the Hillsborough County CRA as a "booking report" rather than a CRA is not dispositive of the issue.

Further, even if there was a dispute over whether the Hillsborough County CRA evidenced Ortiz-Lopez's arrest on the Lee County warrant, the trial court made a factual finding that that was the case, and this finding is fully supported by the evidence in the record. The original arrest warrant and the Hillsborough County CRA are included in the record on appeal, and the CRA clearly shows that Ortiz-Lopez was arrested on the Lee County warrant no later than February 13, 2018. That document, standing alone, is sufficient to support the trial court's finding. Further, the docket entry on which the State relies to argue that the warrant was not served until July 24, 2018, is insufficient to support any such finding. That docket entry by itself proves nothing more than that the served warrant was filed with the clerk on that date. It is probative of the date of filing the return of service; not the date of service itself. Despite this, the State never offered the return of service document, which would indicate the date of actual service, into evidence nor made it part of the record on appeal. Therefore, this court has no evidentiary basis upon which to conclude that the trial court's factual finding concerning the date of Ortiz-Lopez's arrest on the Lee County warrant is incorrect.

Alternatively, the State argues that the speedy trial time did not begin to run until July 23, 2018, when Ortiz-Lopez was physically returned to Lee County, citing rule 3.191(e). That rule provides, in pertinent part:

> **(e) Prisoners outside Jurisdiction.** A person who is in federal custody or incarcerated in a jail or correctional institution outside the jurisdiction of this state or a subdivision thereof, and who is charged with a crime by indictment or information issued or filed under the laws of this state, is not entitled to the benefit of this rule until that person returns or is returned to the jurisdiction of the court within which the Florida charge is pending and until written notice of the person's return is filed with the court and served on the prosecutor.

Fla. R. Crim. P. 3.191(e) (emphasis added). However, as the emphasized portion of the rule shows, this exception applies only when a defendant is both incarcerated out of the jurisdiction of the court and an information or indictment has already been filed. Here, no information or indictment was filed during the time that Ortiz-Lopez was incarcerated in Hillsborough County. Therefore, this rule did not prevent the speedy trial time from continuing to run, and it cannot be used to resurrect charges on which the speedy trial time had already expired.

In sum, we conclude that the trial court erred by denying Ortiz-Lopez's motion for discharge on speedy trial grounds. We must therefore reverse his convictions and sentences and remand for his immediate discharge.

Reversed and remanded for discharge.

KHOUZAM, C.J., Concurs specially.
CASANUEVA, J., Concurs.

KHOUZAM, Chief Judge, Concurring specially.

I concur with the majority's holding that the trial court erred in denying the motion for discharge on speedy trial grounds, and I agree that Ortiz-Lopez is therefore entitled to immediate discharge. I write only to clarify that this result is dictated by the following key facts shown in the record.

On February 2, 2018, Ortiz-Lopez was arrested on the outstanding Lee County warrant arising from a domestic dispute. This arrest triggered the 175-day speedy trial period, which expired on July 27, 2018. Because the State did not file charges against Ortiz-Lopez within this period based on the relevant conduct, it was forever precluded from filing such charges and was not entitled to a recapture period. See State v. Williams, 791 So. 2d 1088, 1091 (Fla. 2001). Consequently, Ortiz-Lopez's motion for discharge should have been granted.

While it is true that Ortiz-Lopez and his attorney did not raise this precise argument below, they did seek his immediate discharge based on the expiration of the speedy trial period stemming from the February 2, 2018, arrest. To the extent that this issue was not properly preserved, failure to preserve it would constitute ineffective assistance of counsel on the face of the record. Accordingly, we have the authority to grant Ortiz-Lopez relief, and I fully agree that we must reverse and remand for his immediate discharge.