

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA

**RICARDO DONES,**

**CASE NO.: 2007-CA-377-O**

**WRIT NO.: 07-05**

**HEERANDAI BASDEO,**

**CASE NO.: 2007-CA-378-O**

**WRIT NO.: 07-06**

Petitioners,

vs.

**STATE OF FLORIDA,**

Respondent.

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Petition for Writ of Prohibition

Robert Wesley, Public Defender and Felix A. Felicier,  
Assistant Public Defender, for Petitioner.

No Response  
For Respondent.

Before WATTLES, LAUTEN, and G. ADAMS, J.J.

**PER CURIAM**

**ORDER GRANTING PETITION FOR WRIT OF PROHIBITION**

Ricardo Dones and Heerandai Basdeo (Petitioners) petition for issuance of a writ of prohibition directing the lower court to dismiss Dones' single count of Criminal Mischief with Damage of More than Two Hundred Dollars, and Basdeo's single count of Battery/Domestic Violence, on the basis that the prosecution of these infractions is barred by the expiration of the speedy trial time period.

Petitioner Dones' speedy trial period commenced on September 21, 2006, and therefore expired on December 20, 2006. Petitioner Basdeo's speedy trial period commenced on September

25, 2006, and therefore expired on December 24, 2006.<sup>1</sup> These cases came before the Court for Pretrial Conference on November 18, 2006, at which time the Court scheduled both matters for trial on December 7, 2006, the last day of a trial period which commenced on November 27, 2006.

On the morning of Petitioners' scheduled trials, the defense announced that it was ready to proceed to trial. However, the Court noted that more cases were set for trial that day than could be accommodated. Once the Court observed that speedy trial would run on these two cases before the next available trial period,<sup>2</sup> the State moved *ore tenus* to extend Petitioners' speedy trial period. The State argued that exceptional circumstances existed within the meaning of Rule 3.191, as the defendants in each of the four cases set for trial on December 7, 2006 had elected a jury trial.

At the conclusion of the State's argument, the Court noted that defense counsel previously requested not to be scheduled for trial on December 4-6, 2006 so that he could attend the Office of the Public Defender's bi-annual training. The State concurred with the Court that this was relevant to whether the speedy trial period should be extended. The Court then extended Petitioners' speedy trial period for 40 days, and set both cases for trial on January 16, 2007. It found that the extension was justified by the existence of exceptional circumstances as enunciated in Rule 3.191(l), Florida Rules of Criminal Procedure. Specifically, the Court explained that the concurrence of counsel's scheduled absence,<sup>3</sup> Defendants' election of a jury trial on the last day of the trial period and the unavailability of jurors until the January, 2007 trial period, collectively constituted exceptional circumstances under Rule 3.191.

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<sup>1</sup> Petitioner Basdeo alleges that his speedy trial period expired on December 27, 2006. However, this would result in a 93 day speedy trial period.

<sup>2</sup> While another trial period would commence on December 17, 2006, before Petitioners' speedy trial periods expired, jury panels were not available beyond December 15th.

<sup>3</sup> It bears mentioning that the Assistant State Attorney had also requested not to be scheduled for appearance on November 28-30, 2006, but later withdrew this request.

Petitioners Basdeo and Dones filed a Notice of Expiration of Time For Speedy Trial on December 27, 2006, and on December 20, 2006, respectively. At the December 29, 2006, hearing on the Notice of Expiration, the State argued that discharge of the cases was improper, in that the court previously extended Petitioners' speedy trial period. The State argued in the alternative that Petitioners' speedy trial rights were previously waived because defense counsel was unavailable for trial for purposes of Rule 3.191(k) from December 4-6, 2006. Defense counsel argued that his request to attend training with the Office of the Public Defender did not constitute unavailability, as he could have made arrangements at any time during that period to appear for trial, had the case been called. Moreover, defense counsel argued that he was granted leave of court well in advance of his absence, and that no mention had previously been made of a resulting waiver of speedy trial rights.

The Court found defense counsel unavailable for trial from December 4-6, 2006, and thus found a waiver of Petitioners' speedy trial rights as of December 7, 2006. Accordingly, the Notice of Expiration was stricken, and Petitioners' cases set for trial on January 16, 2007. Petitioners filed the instant Petitions for Writ of Prohibition on January 12, 2007. State Responses were ordered for Petitioner Dones' and Petitioner Basdeo's Petitions on January 18, 2006 and January 16, 2006, respectively. The State failed to respond to either order. Petitioner Basdeo's Petition was consolidated with Petitioner Dones' Petition on January 24, 2007.

**A. Entitlement to Writ of Prohibition:**

Prohibition is preventative and not corrective. *English v. McCrary*, 348 So. 2d 293 (Fla. 1977). It is the appropriate remedy to prohibit trial court proceedings where an accused has been denied his right to a speedy trial and his motion for discharge or dismissal has been denied. *Sherrod v. Franza*, 427 So.2d 161 (Fla. 1983). Additionally, it is the appropriate method by which an accused who asserts that his prosecution is barred by the statute of limitations may challenge the trial

court's jurisdiction to go forward. *Neal v. State*, 697 So. 2d 903 (Fla. 2d DCA 1997). Prohibition is granted only when the lower tribunal is without jurisdiction, or is attempting to act in excess of its jurisdiction. *Southern Records and Tape Service v. Goldman*, 458 So. 2d 325, 326 (Fla. 3d DCA 1984). A Defendant seeking a writ of prohibition due to an alleged violation of speedy trial rights must move for discharge, and the trial court must hold a hearing on such motion, after which the motion must be denied. *McKinney v. Yawn*, 625 So. 2d 885, 886 (Fla. 1st DCA 1993). Findings of fact made by the trial court at this hearing are conclusive. *Id.* The subsequent prohibition proceeding concerns only the legal sufficiency of the order denying discharge. *Id.*

## **B. Speedy Trial**

Speedy trial for misdemeanors is governed by Rule 3.191, Florida Rules of Criminal Procedure. Generally, a defendant charged with a misdemeanor shall be brought to trial within 90 days of the date the defendant is taken into custody, namely, from the date of arrest or service of notice to appear. Fla. R. Crim. P. 3.191(a),(d). Rule 3.191 further provides that if the trial of an accused does not commence within this time period, a defense motion for discharge must be granted unless one of multiple statutory exceptions exist. *See Dixon v. State*, 901 So. 2d 384, 386 (Fla. 3d DCA 2005). Among these exceptions are a proper extension of speedy trial, and defense unavailability for trial. *Id.*, 3.191(j), Fla. R. Crim. P.

### **1. Unavailability for Trial**

A Defendant waives speedy trial rights when he or she is unavailable for trial, as defined by Rule 3.191(k), Florida Rules of Criminal Procedure. The burden of establishing defense unavailability under Rule 3.191(k) rests on the state, and no presumption of unavailability attaches. Fla. R. Crim. P. 3.191(k); *Dixon*, 901 So. 2d at 386. Defense unavailability can be found by the trial court when either the Defendant or defense counsel fails to attend a proceeding required by rules or

by notice of the court, or when the defense is not ready to proceed on the scheduled trial date. *Id.* A finding of unavailability must stem from a failure to appear in court on a specific date for which defendant was scheduled to appear, and for which notice was properly served. *See Dixon.* Unavailability cannot be found when the defense is granted leave of court for a time period prior to trial, and thus has no scheduled appearance. *Mishan v. Crews*, 363 So. 2d 1178 (Fla. 1st DCA 1978)(defendant granted two week leave of court to travel to England and arrange personal affairs was not unavailable for trial).

In the instant cases, defense counsel's supervisors at the Office of the Public Defender presented a request to the Court via email on June 27, 2006, that counsel not be scheduled for trial from December 4-6, 2006. The Court chose to honor this request, and refrained from scheduling trial during this time. There is no evidence here that the defense failed to appear for trial or any other scheduled proceeding below. Moreover, the defense absence during trial period was planned well in advance, and occurred with express permission of the Court. In light of the *Mishan* decision, the defense in this case cannot be deemed unavailable for trial.

## **2. Extension of Speedy Trial for Exceptional Circumstances**

The trial court may, at its discretion, extend speedy trial period for a reasonable length of time when exceptional circumstances are shown to exist. Fla. R. Crim. P. 3.191(i). Accordingly, such decisions are evaluated in prohibition proceedings for abuse of discretion. *Routly v. State*, 440 So. 2d 1257, 1261 (Fla. 1983); *Talton v. State*, 362 So. 2d 686 (Fla. 4<sup>th</sup> DCA 1978). The speedy trial period may be extended due exceptional circumstances upon "a showing by the accused or the state of *necessity for delay grounded on developments that could not have been anticipated* and that materially will affect the trial." Fla. R. Crim. P. 3.191(l)(4) (emphasis added). Rule 3.191(l) provides, however, that general congestion of the court's docket does not constitute exceptional

circumstances and other avoidable, foreseeable delays do not constitute exceptional circumstances. *Id; Swalheim v. State*, 717 So. 2d 578 (Fla. 5th DCA 1998)(docket congestion not a legally sufficient reason to extend speedy trial). Moreover, the court custom of not empanelling juries during regularly scheduled holiday does not constitute exceptional circumstances. *Jones v. State*, 70 So. 2d 905 (Fla. 2d DCA 1998). Generally speaking, the showing required by Florida courts to justify a finding of exceptional circumstances is exacting, and excludes even complex logistical predicaments if there is any indication that they could have been avoided. *See, e.g. T.C. v. State*, 540 So. 2d 937 (Fla. 2d DCA 1999)(loss of file by clerk's office did not constitute exceptional circumstances as state did not address lost file with clerk or judge until shortly before speedy trial ran); *Hajal v. State*, 864 So. 2d 1167 (Fla. 5th DCA 2004)(state key witness absence due to vacation was not exceptional circumstance, when state made no showing that vacation plans were unexpectedly changed, or that witness could not return for court if requested to do so).

Here, the state presented multiple grounds for a finding of exceptional circumstances, namely, the election of four Defendants to proceed to a jury trial on the last day of the trial period, the pending unavailability of jurors, and counsel's previous planned absence from court. Each of these amounts individually to an issue of docket congestion, or an administrative dilemma which could have been avoided. Unfortunately, there is no Florida case law or rule of procedure which reasonably allows an extension of speedy trial upon the concurrence of multiple situations which, in and of themselves, do not rise to the level of exceptional circumstances.

Because the defense was continuously available for trial, and there were not exceptional circumstances justifying the extension of Petitioners' speedy trial periods, the Court is without jurisdiction to proceed.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Prohibition is GRANTED and the trial court is directed to dismiss Petitioners' cases.

DONE AND ORDERED, in Chambers, at Orlando, Orange County, Florida, this \_\_8\_\_ day of June 2007.

\_\_\_\_\_/S/\_\_\_\_\_  
BOB WATTLES  
Circuit Court Judge

\_\_\_\_\_/S/\_\_\_\_\_  
FREDERICK J. LAUTEN  
Circuit Court Judge

\_\_\_\_\_/S/\_\_\_\_\_  
GAIL A. ADAMS  
Circuit Court Judge

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand delivery this \_\_8\_\_ day of June 2007 to the parties listed below:

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\_\_\_\_\_  
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