

CIRCUIT COURT FOR THE JUDICIAL CIRCUITS OF FLORIDA

Dimillo v. State

39 Fla. Supp. 2d 46 (1989) · Decided October 2, 1989

SUMMARY

The court held that a defendant’s absence from a calendar call did not constitute unavailability for trial under Florida Rule of Criminal Procedure 3.191(e) when no order required the defendant’s attendance. It further held that a speedy-trial waiver executed to avoid arrest for nonattendance at such a hearing was a nullity. The judgment was reversed, and the defendant was discharged.

CASE DETAILS

COURT	Circuit Court for the Judicial Circuits of Florida
WRITING FOR THE COURT	Carlisle, J.
JURISDICTION	Florida
DECIDED	October 2, 1989
DISPOSITION	reversed
PROCEDURAL POSTURE	Dimillo challenged the effect of his absence from a calendar call and a speedy-trial waiver executed to avoid issuance of a capias. After the waiver, the case proceeded to trial and Dimillo was convicted. The court reversed the judgment and discharged Dimillo.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Dimillo v. State

TOPICS

- speedy trial
- criminal procedure

PRACTICE AREAS

- Criminal procedure
- Speedy trial

QUESTIONS PRESENTED

- Whether a defendant's absence from a calendar call constitutes unavailability for trial under Florida Rule of Criminal Procedure 3.191(e) when no order requires the defendant's presence.

2. Whether a speedy-trial waiver executed to avoid arrest for nonattendance at a hearing that did not require the defendant's presence is valid.

HOLDINGS

1. A defendant's failure to attend a calendar call does not constitute unavailability for trial when no order requires the defendant's presence at the calendar call.
2. A speedy-trial waiver executed to avoid arrest for nonattendance at a calendar call that did not require the defendant's presence is a nullity.

KEY QUOTATIONS

"A waiver under circumstances such as this is a total nullity." (48)

"A waiver of speedy trial to avoid arrest for non-attendance at a hearing which does not require the defendant's presence is a nullity." (48)

"Speedy trial ran and the defendant thereafter was required to go to trial and was convicted." (48)

FACTUAL BACKGROUND

Dimillo did not appear at a calendar call, but his attorney appeared and the record contained no order requiring Dimillo's presence. The State sought a capias for his nonattendance, and the trial court indicated that it would issue one. To avoid arrest, Dimillo executed a form waiving speedy trial, expressly noting that the waiver was made to avoid a capias. He was subsequently required to go to trial and was convicted.

PROCEDURAL HISTORY

At a calendar call, the State requested a capias based on Dimillo's nonattendance, although his attorney was present. The trial court indicated it would issue the capias, and Dimillo executed a speedy-trial waiver to avoid arrest. The case was later tried, and Dimillo was convicted. The reviewing court held that the waiver was invalid, concluded that speedy trial had run, reversed the judgment, and discharged Dimillo.

DISPOSITION

reversed

REMAND INSTRUCTIONS

No remand was ordered; the defendant was discharged.

CASES CITED

- State v. Katz, 438 So. 2d 80 (Fla. 3d DCA 1983)
- Morrow v. State, 458 So. 2d 313 (Fla. 5th DCA 1984)
- Fulk v. State, 417 So. 2d 1121 (Fla. 5th DCA 1982)

OPINION

CARISLE, J.

OPINION OF THE COURT CARISLE, J. This case presents two issues: 1. *47Whether Dimillo's absence from a calendar call amounted to unavailability for trial, pursuant to Rule 3.191(e) Rules of Criminal Procedure; and 2. the effectiveness of a waiver of speedy trial executed to avoid the issuance of a *capias* for non attendance at a calendar call.

The record before us does not reflect any order of the trial court requiring the presence of defendants at calendar call. Calendar call is generally considered a proceeding before the court, usually on a Friday, wherein the court reviews with counsel their availability and readiness to proceed to trial during the following week. Many case are set for calendar call and the court inquires of counsel whether they are not presently engaged in a trial which would extend into the following week, or otherwise scheduled for trial during the following week before another court.

Different judges might pursue additional inquiries or attempt to effect other arrangements. Nevertheless, the basic function of calendar call is to determine which cases will be tried during the following week and their approximate duration and order. Rule 3.180 Rules of Criminal Procedure does not require the presence of a defendant at calendar call.

In *State v Katz*, 438 So.2d 80 (Fla. 3d DCA 1983), Katz had petitioned the United States Supreme Court for a Writ of Certiorari. A stay issued by the Florida Supreme Court had expired and Katz did not obtain further stays.

The Florida Supreme Court issued its mandate reinstating the information on December 2, 1981. The speedy trial period had begun to run. The Clerk of the Circuit Court notified the parties to appear for the purpose of setting a trial date. Neither Katz nor his attorney appeared.

The Third District Court of Appeal held that since Rule 3.180 Rules of Criminal Procedure does not require attendance at a hearing scheduled for the purpose of setting a trial date Katz was available for trial despite non-attendance at the hearing.

In *Morrow v State*, 458 So.2d 313 (Fla. 5th DCA 1984), it was held that the failure of a defendant and his counsel to attend a trial scheduling conference does not establish that the defendant was unavailable for trial.

In *Fulk v State*, 417 So.2d 1121 (Fla. 5th DCA 1982), the defendant and counsel did not appear, despite a form order entitled "Notice of Pretrial Conference, Motion/Docket Day, and Order Setting Case for Trial", which had been issued at arraignment.

The pertinent parts of that order are set out in Footnote 3 of that Opinion. The Fifth District Court of Appeal was at pains to note that nothing in the order required the presence of either the defendant or *48her counsel.

The court went on to hold that failure to attend did not amount to unavailability for trial. Therefore, in the absence of an order requiring Dimillo's attendance at the calendar call there was no requirement that he attend. His attorney was present and the State concedes that no mention was made of any fear that Dimillo would not be present at trial.

We, therefore, conclude that Dimillo was at all times available for trial. At the calendar call the State requested a capias and the court indicated that it would issue one. Dimillo's attorney asked whether the court would reset the case if he would waive speedy trial.

The court said that it would and defendant executed a waiver of speedy trial form. He noted thereon "To avoid capias by court for defendant's failure to appear." To review the bidding at that point, the trial court was about to order defendant's arrest for non-attendance at a hearing which he was not required to attend.

To avoid that unpleasant prospect defense counsel agreed to withdraw his demand for speedy trial. A waiver under circumstances such as this is a total nullity. To be sure trial courts have the inherent authority to command defendant's presence at a multiplicity of hearings not mentioned in Rule 3.180. But in the absence of such an order, failure to attend a calendar call does not amount to unavailability for trial.

A waiver of speedy trial to avoid arrest for non-attendance at a hearing which does not require the defendant's presence is a nullity. Speedy trial ran and the defendant thereafter was required to go to trial and was convicted.

The judgment of the trial court is hereby reversed and the defendant is discharged.