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TRIAL - APPEAL - POST-CONVICTION RELIEF

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July 10, 2009

Levys Solicitors
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Re: *State of Florida v. Phillip Harkins*, Case Number 99-12941-CF, Division CR-B

Dear Sirs:

You have requested our legal opinion whether under applicable Florida law, your client, Mr. Phillip Harkins' (hereinafter "Harkins"), first degree murder charge is subject to dismissal, pursuant to Rule 3.191, Florida Rules of Criminal Procedure (1999).

Opinion

Subject to the matters set forth below, it is our professional opinion under Florida law, that the first degree murder charge lodged against Phillip Harkins by the State Attorney for the Fourth Judicial District of Florida, Jacksonville, Florida in Case Number 99-12941-CF, Division CR-B, should be dismissed under Rule 3.191, Florida Rules of Criminal Procedure. Such dismissal should be with prejudice, meaning that charges could not be refiled after dismissal, and Mr. Harkins would be free to be released on this charge.

Basis for Rendering Opinion

In order to render our opinion, we have been provided or obtained and reviewed the following documents and our opinion is limited to the review of these documents:

Deposition of Detective J. E. Davis dated February 9, 2000 (135 pages); Arrest and Booking Report of Phillip Harkins for aggravated assault, sworn to August 11, 1999; Arrest Affidavit and Arrest Warrant dated August 11, 1999 for Phillip Harkins on aggravated assault charge, Arrest and Booking Report dated August 14, 1999 charging Harkins with murder, Homicide Continuation Report dated October 5, 1999 (43 pages); Homicide Supplemental Report dated April 12, 2000 (12 pages).

We believe it is reasonable to rely upon such documents in rendering our opinion.

Facts

The facts clearly establish that Harkins was arrested for purposes of Rule 3.191 on August 11, 1999.

The chief investigator was Jacksonville Sheriff's Office Detective J. E. Davis. Detective Davis's 43 page homicide continuation report dated October 5, 1999, describes the basic homicide investigation of the death of Joshua Keith Hayes, reported to the police at 10:45 p.m. August 10, 1999. The victim had been killed by a gun shot wound to the head. Several witnesses canvassed at the scene that evening reported two vehicles driving from the scene after the shot was heard. Early in the morning hours of August 11, 1999 police had already identified Phillip Harkins as a suspect. According to the victim's brother he had been going to buy some marijuana and had gotten into a car with a man named Tonney Randle He had $600-800 on him. Tonney Randle lived with Phillip Harkins and Harkins had been seen earlier that same evening with an assault rifle and ammunition clip. A witness showed the police where Tonney Randle and Phillip Harkins lived, the Pioneer Point Apartments on Mayport Road, apartment 612. The police made a cursory search of the vehicles in the parking lot looking for evidence, but did not make contact with anyone in the apartment. By the morning of August 11, 1999 police believed the murder weapon could be found in Phillip Harkins apartment, because he had been seen with an assault rifle there.[1] Based on that arrest warrant affidavit, police also knew that

[1] At the same time police allegedly learned that an arrest warrant for Harkins had issued that same morning based on an unrelated allegation of aggravated assault that had allegedly occurred the day before, August 10, 1999, the same day as Hayes murder. According to the affidavit for the arrest warrant, Harkins was in a car driven by Tonney Randle and Harkins had threatened some women with the gun demanding

earlier the same day as the murder, Harkins had had a firearm and was looking for someone.

At that point police established surveillance at Harkins' apartment to try to find him. Detectives prepared a description of Harkins' apartment for purposes of seeking a search warrant to look for the murder weapon there. Police contacted the apartment management and learned that Harkins was the only person on the lease for apartment 612, and the apartment management thought he was involved in "shady business." However, an assistant state attorney (a prosecuting attorney) was consulted and concluded that there was not sufficient probable cause for a search warrant for the apartment.

The surveillance resulted in an observation of Harkins near his apartment. At this point the homicide report narrative described Harkins as a suspect in the Hayes murder. Several police units were dispatched and vehicles stopped on the road searching for Harkins. Harkins was in one such vehicle that was stopped, and when confronted he fled into a wooded area. K-9 (search dog) units and a helicopter was dispatched and Harkins was ultimately apprehended.

Harkins was taken in custody to the Jacksonville Sheriff's Office homicide squad room for interrogation August 11, 1999. Before being questioned about the murder of Hayes, the police read Harkins his *Miranda* rights.[2]

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to know where their unnamed boyfriends were.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). The giving of the *Miranda* rights before questioning Harkins about the Hayes murder is virtually dispositive of the issue presented by this opinion letter. That is because the law is well settled in the United States that *Miranda* rights are only required when a suspect is (1) in custody, and (2) *for the offense being questioned*. That is, if police have a suspect in custody on charge one, but wish to question him about charge two, no *Miranda* rights are required prior to questioning regarding charge two, even though the suspect is in custody. The police are well trained in these procedures and make use of them when possible to make it easier to obtain statements. *But see*, *Griffin v. State*, 474 So.2d 777 (Fla. 1985) (stating in *dicta*, "a person may be "in custody" for purposes of *Miranda* requirements but not for purposes of the speedy trial rule.")

During that interview of Harkins about the murder Harkins admitted having a firearm at the apartment, but claimed it had gone missing that very day. Harkins also admitted cleaning out his car that day. The gun whose ownership he admitted was the same caliber weapon as the shells that were found on the ground at the murder scene.

Witnesses reported that Harkins and Tonney Randle sold drugs and were known to short change buyers in drug deals. Harkins admitted that Randle would broker drug deals and that he too had arranged drug transactions.

Harkins was only questioned about the aggravated assault charge one time, he denied knowledge and police did not pursue the questioning on the aggravated assault. It is clear that the purpose of the police surveillance, car stop, search, arrest and questioning of Harkins was for the murder and not the aggravated assault.

Harkins attempted to use his girlfriend as an alibi, but when she was asked to confirm it, she could not tell police what time during the night he came to her apartment, only that she was asleep when he arrived. When questioned further Harkins version of his time with his girlfriend clearly was inconsistent with what she told police. Hence, he was known to be giving a false exculpatory statement for an alibi.

Harkins was kept in the homicide detective's interrogation room continuously from about 2:45 in the afternoon of August 11, 1999 until he was booked into the jail the after midnight of the following day, August 12, 1999. He was not free to leave.

At 8:00 p.m. August 11, 1999 Tonney Randle turned himself in to the police. Detective Davis interrogated Randle, and Randle gave a statement that Harkins had shot and killed the victim Hayes. While Randle was giving this statement to Detective Davis, Harkins was still being held in custody in another homicide interrogation room. At 9:05 p.m. the police had Randle commit to his statement in writing, which he did, again incriminating Harkins in the murder.

Harkins was not formally booked into jail on the aggravated assault charge until August 12, 1999. The official paperwork charging Harkins with murder was not completed until August 14, 1999, but he had been in custody since August 11, 1999 as noted above and Harkins was formally booked into jail on the murder charge until

August 14, 1999.[3]

Harkins was indicted for first degree murder on February 4, 2000, 177 days after his arrest.[4]

Analysis and Conclusion

HARKINS IS ENTITLED TO DISCHARGE ON SPEEDY TRIAL GROUNDS, UNDER RULE 3.191(a), FLORIDA RULES OF CRIMINAL PROCEDURE, BASED ON HIS ARREST ON AUGUST 10, 1999 AND THE FAILURE OF THE STATE TO FORMALLY CHARGE HARKINS WITH FIRST DEGREE MURDER BY INDICTMENT UNTIL FEBRUARY 4, 2000.

Harkins is entitled to file a motion for discharge and dismissal under Rule 3.191(a), Florida Rules of Criminal Procedure as interpreted by *State v. Williams,* 791 So.2d 1088, 1091 (Fla. 2001), *State v. Naveira*, 873 So.2d 300 (Fla. 2004). Harkins was arrested on August 10, 1999 in Duval County, Florida. The State of Florida did not formally charge Harkins with first degree murder until February 4, 2000, more than 175 days after the initial arrest. The failure to formally file the first degree murder charge against Harkins within the 175 day window of Rule 3.191(a) entitles Harkins to dismissal of the charges with prejudice.[5]

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[3] These chronological facts of record prove that the "booking" process, that is, the completion of the paperwork and the formal charging process at the jail, does not define nor necessarily correlate to when a person is taken into custody or arrested. Clearly Harkins had been in custody and under arrest for both the aggravated assault and the murder charge on August 11, 1999, but was not formally booked on either charge until later.

[4] But 176 days for speedy trial purposes, under which the day of arrest is not counted. *State v. Naveira*, 768 So.2d 1254 (Fla. 1st DCA 2000).

[5] Rule 3.191(a) provides:

> (a) Speedy Trial without Demand. Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime shall be brought to trial

Speedy trial begins to run when an accused is arrested and taken into custody and continues to run even if the State does not act to file formal charges until after the expiration of the speedy trial period. *State v. Williams,* 791 So.2d 1088, 1091 (Fla. 2001).[6] Although Rule 3.191(a) by its express terms does not require the State file an information within the speedy trial period, that requirement has been engrafted onto the rule by the Florida Supreme Court. *State v. Naveira*, 873 So.2d 300 (Fla. 2004).[7] Because Harkins was arrested on August 10, 1999, and the State did not file the charging information until February 4, 2000, more than 175 days later, he was entitled to discharge under the speedy trial rule.

The Florida Supreme Court has made clear that the speedy trial discharge date begins to run from the date the defendant is taken into custody, not when charges are formally documented:

> within 90 days of arrest if the crime charged is a misdemeanor, *or within 175 days of arrest if the crime charged is a felony*. If trial is not commenced within these time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p). The time periods established by this subdivision shall commence when the person is taken into custody as defined under subdivision (d). A person charged with a crime is entitled to the benefits of this rule whether the person is in custody in a jail or correctional institution of this state or a political subdivision thereof or is at liberty on bail or recognizance or other pretrial release condition.

[6] *State v. Williams,* 791 So.2d 1088, 1091 (Fla. 2001) ("Thus, we hold that the 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.")

[7] "We confirm that the State may file a charging document at any time within the applicable speedy trial period. Under *Williams*, however, the State cannot charge the defendant after that period expires. Essentially, then, the speedy trial deadline also acts as the deadline for charging the defendant." *State v. Naveira,* 873 So.2d 300, 304-305 (Fla. 2004).

> This Court has consistently held that the 175-day speedy trial period begins upon a defendant's initial arrest. See *Weed v. State*, 411 So.2d 863, 865 (Fla.1982) ("[T]he date of the original arrest is the focal point for speedy trial considerations, irrespective of changes made in charges. Only in specifically delineated circumstances can the time periods be adjusted."); see also *State v. Naveira*, 873 So.2d 300, 305 (Fla.2004) (citing *Genden v. Fuller*, 648 So.2d 1183, 1184 (Fla.1994)) ("The speedy trial period begins when a defendant is first taken into custody, not when charges are first filed.").

Bulgin v. State, 912 So.2d 307, 310 (Fla. 2005).

It is the duty of the state to proceed in a timely manner and the defendant has no obligation to assert his right:

> Under the speedy trial rule, the defendant, upon being arrested, has no obligation under the rule to further assert his right to be brought to trial unless he first waives his right. The *Williams* decision [*Williams v. State*, 757 So.2d 597 (Fla. 5th DCA 2000)] correctly points out that it is the State's responsibility to bring those arrested to trial within the times provided in the speedy trial rule. Further, as noted above in *Weed* [*Weed v. State*, 411 So.2d 863, 865 (Fla.1982)], this Court has consistently disapproved of any action by the State unilaterally tolling the running of the speedy trial period.

Bulgin v. State, 912 So.2d 307, 311 (Fla. 2005).

The speedy trial rule itself states that: "[t]he time periods established by this subdivision shall commence when the person is taken into custody as defined under subdivision (d)." Fla. R. Crim. P. Rule 3.191(a). Subsection (d) provides: "Custody. For purposes of this rule, a person is taken into custody (1) when the person is arrested as a result of the conduct or criminal episode that gave rise to the crime charged . . . Fla. R. Crim. P. Rule 3.191(d).

The record of the physical booking and formal paperwork is not dispositive of when Harkins was "arrested" for purposes of triggering the speedy trial rule because "[a] formal arrest, complete with fingerprinting and formal charges, is not always

necessary to start the running of the speedy trial time." *Williams v. State*, 757 So.2d 597, 599 (Fla. 5th DCA 2000); *see also State v. Lail*, 687 So.2d 873 (Fla. 2nd DCA 1997); *State v. Christian*, 442 So.2d 988 (Fla. 2nd DCA 1983); *Bannister v. State*, 382 So.2d 77 (Fla. 5th DCA 1980).

This was not a momentary investigatory detention, rather this was a full scale arrest, with helicopter, K-9 unit, and detention that lasted from early afternoon until after midnight, when Harkins was finally formally booked into the jail. He was not free to go during any of this time.

In *Melton v. State*, 75 So.2d 291, 294 (Fla. 1954), the Florida Supreme Court defined an "arrest" as follows:

> It is uniformly held that an arrest, in the technical and restricted sense of the criminal law, is 'the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime.'... When used in this sense, an arrest involves the following elements: (1) A purpose or intention to effect an arrest under a real or pretended authority; (2) An actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested; (3) A communication by the arresting officer to the person whose arrest is sought, or an intention or purpose then and there to effect an arrest; and (4) An understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him.

The Florida Supreme Court continues to use this definition of arrest for resolving speedy trial issues. *See Brown v. State*, 515 So.2d 211 (Fla. 1987). The test was met in Harkins' case. Harkins was arrested, handcuffed and placed in a police vehicle, then taken to the Jacksonville Sheriff's Office *homicide* interrogation room where he was held in custody until being booked after midnight the following day. Clearly this was an arrest for speedy trial purposes. *See Williams v. State*, 757 So.2d 597, 599 (Fla. 5th DCA 2000).

Conclusion

Harkins is entitled to dismissal with prejudice of his pending first degree murder

charge.

Disclosure

We have been compensated in connection with the issuance of this opinion. The compensation amount is reasonable under Florida Bar standards for the time and matter involved. The receipt of compensation did not determine or affect the opinion that has been rendered. The compensation was made in advance of rendering the opinion, was non-refundable, and was not contingent on the opinion rendered.

Credentials

William Mallory Kent graduated from the Bolles School, a private, college preparatory school in Jacksonville, Florida ranked first in his class in 1970. Thereafter he was admitted to Harvard College, Cambridge, Massachusetts, graduating with honors in 1975, with a concentration in German Literature. Mr. Kent has studied abroad at both Ludwig Maximillians Universitaet, Munich, Germany and Adam Mickiewicz Universitaet, Poznan, Poland. He was admitted to the University of Florida College of Law (Levin College of Law) and graduated with honors in 1978, at which time he was admitted to the Florida Bar. He has continuously been a member of the Florida Bar since 1978, a period of 31 years. His law practice has focused exclusively on criminal defense, trial and appeal, since 1987,[8] a period of 23 years. For the past ten years his practice has been more than 90% criminal appellate. Over the past 23 years, Mr. Kent has been primary counsel on well over 300 hundred criminal appeals. His criminal appellate practice has included arguing and winning the noted federal criminal sentencing case, *Terry Lynn Stinson v. United States*, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598, 61 USLW 4447 (1993), at the United States Supreme Court, as well as having briefed or argued criminal appeals and habeas corpus proceedings in numerous courts across the United States, from California to New York and in between, including all five Florida district appellate courts, Florida's Supreme Court and all three Florida federal district courts. Mr. Kent

[8] Prior to that he had been an associate in the Los Angeles and New York offices of Rogers & Wells, which later merged into and has become known as Clifford Chance, which is headquartered in London. Mr. Kent's practice at Rogers & Wells was limited to corporate finance, with an emphasis on real estate tax shelters and related financings.

is a member of the Florida Bar Appellate Rules Committee and is the former President of the Northeast Florida Criminal Defense Lawyers Association. Mr. Kent has been a speaker at numerous bar associate seminars on criminal matters, most recently having been asked to speak to the Jacksonville Bar Association June 18, 2009 to teach an update seminar on Florida sentencing law.

Respectfully submitted,

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