Daniel SPARYMAN.
Appellant.

vs.

The Hon. Charles MCCLURE. Jr.. as County Judge of the County Court. In and for Leon County.
Appellee.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. BE--92

INITIAL BRIEF

Filed by the Appellant. Pro Se
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TABLE OF CITATIONS

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SUMMATION OF ARGUMENT

Fla. R. Crim. P. 3.191 (d)(3) requires that trials must must begin within 90 days of a written or recorded order denying discharge of an accused for grounds of a lack of a speedy trial. The question relates to the beginning point of this 90 day period when a judge's order denying discharge is pronounced and recorded in open court via a cassette tape recorder used by court personnel to keep an official record of proceedings and a court form, CCC-95, used also by the court for a similar purpose, and the judge enters a written order 43 days later also denying discharge. In denying a second Motion for Discharge, submitted well after 90 days past the pronouncement in open court of the judge's order originally denying discharge, the lower courts have stated that the 90 days begins with the entry of the written order, which occurred less than 90 days before submission ofAppellant's second Motion for Discharge, and would thus vitiate the second Motion for Discharge.

Appellant argues that Fla. R. Crim. P. 3.191 is a speedy trial rule. The clear intent of the rule is to move things along, not retard them. That the judge took 43 days to even issue a written order in this context, especially after already having decided the outcome in open court, does not harmonize with the spirit of the rule. Appellant also would argue that the "written or recorded" language in the rule is there to se-

I. STATEMENT OF THE FACTS

Appellant was charged by information on or about September 24, 1983, with driving under the influence of alcohol or a controlled substance and possession of narcotics paraphernalia following his illegal arrest for the same on September 23, 1983. Appellant asked for a continuance soon afterwards, waiving his right to speedy trial and pleading not guilty. The State eventually consolidated both informations into a single information brought in Leon County Court on January 11, 1984. Further continuances on both sides followed. Appellant's counsel was withdrawn by Court Order on June 7, 1984, and Appellant was given a 30 day continuance to investigate his case. He filed a Motion for Discharge entitled "Motion for Dismissal" on July 17, 1984, which was heard and denied by the Hon. Charles McClure, along with Appellant's previously filed Motion to Suppress on July 31, 1984.

Appellee applied for a continuance on August 3, 1984, which was granted August 6, 1984. Appellant then filed a Motion to Strike Pleadings on September 7, 1984.

On September 13, 1984, the court entered a written Order denying the previously heard Motions for Discharge and Supression of Evidence.

During this same time frame, Appellant learned via television that a key State's witness, J. E. Crawley, Florida Highway Patrol trooper, was the subject of an investigation by the Governor's Office for filing false reports.

Appellee filed another Motion to Continue on September 20, 1984, followed by another Motion to Strike Appellant's Motion to Dismiss or in the Alternative to Suppress, on October 2, 1984, in response to a Motion which Appellant had filed on March 29, 1984. These Motions were heard on October 19, 1984, and denied.

On October 29, 1984, 90 days had elapsed from the denial of Appellant's Motion for Discharge in open court by Judge McClure. On this date, no order extending the speedy trial period was extant, and during the preceding 90 days Appellant had always been available for trial. No discovery was in progress by either side.

On November 1, 1984, 90 days had elapsed from Appellee's initial continuance after Appellant's Motion for Discharge had been denied.

On November 16, 1984, Appellant filed his second Motion for Discharge along with an amended Motion to Dismiss. These were heard and denied in open court on November 20, 1984. Written order for this denial was entered the day of trial, November 29, 1984.

Appellant filed a Petition for a Writ of Prohibition and an Order to Show Cause in the Court of the Second Judicial Circuit on November 28, 1984. Then, the Hon. J. Lewis Hall, Jr., entered a written order denying Appellant's Petition. The instant litigation is an appeal and petition for Certiorari from Judge Hall's Order denying Appellant's petition on the grounds that the trial court's order denying Appellant's first Motion for Discharge was not "rendered",

as required by Fla. R. Crim. P. 3.191(d)(3), until it was issued on September 13, 1983, in written form, thus causing the trial, which occurred on November 29, 1984, to fall within a period within 90 days of the written order. Thus the Question;

II. ARGUEMENT

DOES THE TIME FOR SPEEDY TRIAL PURPOSES AFTER DENIAL OF A MERITLESS MOTION FOR DISCHARGE AS PROVIDED UNDER FLA. R. CRIM. P. 3.191(d)(3) FOR TRIAL TO OCCUR BEGIN WHEN THE MOTION IS RULED UPON IN OPEN COURT AND A WRITTEN RECORD THEREOF IS ENTERED OR WHEN A WRITTEN ORDER IS ENTERED LATER?

Appellant can find no prior case where this question has been addressed by a Florida Court. Therefore his analysis begins with the rule itself, F. R. Crim. P. 3.191 (d)(3):

> If the trial of the accused does not commence within the periods of time established by this Rule, a pending motion for discharge shall be granted unless it is shown that (i) a time extension has been ordered under (d)(2) and that time extension has not expired, or (ii) the failure to hold trial is attributable to the accused, a co-defendant in the same trial, or their counsel, or (iii) the accused was unavailable for trial under section (e), or (iv) the demand referred to in section (c) is invalid. If the court finds that discharge is not appropriate for reasons under (d)(3)(ii),(iii), or (iv), the pending motion for discharge shall be denied provided however, trial shall be scheduled and commenced within 90 days of a written or recorded order of denial.[1]

1. Emphasis is Appellant's.

Appellant notes at the outset that the language of the Rule does not confine the Order which triggers the 90 day period in which trial commencement must occur to a written order, as the Hon. Judge J. Lewis Hall, Jr. implied below in his order denying the Writ of Prohibition, for the words "or recorded order of denial" follow the word "written," and thus modify it under the plain meaning of the language. Thus, Appellant believes the denial triggering the trial commencement period need not be written, only recorded.

The order of denial given in this case was an oral one, recorded in two different manners. One was upon form CCC-95, a record kept by the Clerk of the Leon County Court, and in this instance dated "7-31-84," which lists Appellant's erroneously entitled "Motion to Dismiss" as "Denied." The other form of recordation is upon a cassette tape recorder kept by the Clerk of the Court for transcript purposes which recorded the proceedings that day.

Appellant argues that both methods of recording Judge McClure's denial of Appellant's Motion clearly fit within those elements of the rule which trigger the 90 day period within which trial must commence under the rule.

Although there is a divergence of thought upon the matter, Appellant also believes that the case law, particularly when viewed in light of constitutional and public policy considerations, upholds his point of view.

The Florida Supreme Court, as early as the case of

State ex rel. Watts v. Sander, 145 Fla. 425, 199 So. 356 (Fla., 1940), ruled that an order become final and effective as soon as it was rendered. Ibid., at 358. That case involved a probate judge, who, pro hac vice, rendered an order to probate a will after hearing arguements by the !arties. The Florida Supreme Court denied the rule nisi in prohibition requested by the relators when they learned the pro hac vice judge had signed the written order after he had resigned his temporary post in the circuit of the probate action and left the jurisdiction, holding that the order was effective upon rendition, meaning in that case, when rendered orally within the jurisdiction. Ibid., at 358.

This reading of the law was supported by the Florida Supreme Court a few years later in the case of Wheeler Fertilizer Company v. Rodgers, 49 So.2d 83 (Fla., 1950), in Justice Hobson's special concurrence, concurred with by all members of the Court participating in the decision. The defendant in that case filed a petition for a Writ of Mandamus to enforce a final judgment which had been vacated after the end of the judicial term in which the judgment had been entered by a judicial order. The petition stated the rule that control of judgments and orders passed out of the hands of the trial court once the term of court ended as grounds to uphold the original judgment. The Supreme Court, reviewing the original judgment order, noted that

the order had been reduced to writing and inadvertently entered as a final judgment via error or mistake, and as such, was correctable at any time. Justice Hobson, in his special concurrence, noted that the verbal order given by the Appellee judge was not the order entered as final judgment in the case, which led him to the following dictum:

> . . . An order is usually considered rendered when it is pronounced by the judge in open court. Such order is the true order and its reduction to writing is merely for the purpose of completing the record and of providing a predicate for execution or appeal.

Wheeler Fertilizer Co. v. Rodgers, 49 So.2d 83, at 87.

Appellant is fully aware that there is a line of cases grounded in the Florida Supreme Court's ruling in Barry v. Robson, 65 So.2d 739 (Fla., 1953), and followed by the First District Court of Appeals in Anders v. Anders, 396 So.2d 439 (Fla. 1st DCA, 1979), Dalton v. Dalton, 412 So.2d 928 (Fla. 1st DCA, 1982), and Pruitt v. Brock, 437 So.2d 768 (Fla. 1st DCA, 1983), which appear to differ with Appellant's proffered view. But Appellant believes these cases to be distinguishable from the case at hand, if not overrulled by the recent Florida Supreme Court case of Casto v. Casto, 404 So.2d 1046 (Fla., 1981), rehearing denied, 1981.

A close reading of the Casto case is useful in resolving the question at hand. The issue in the Casto case was whether a petition for rehearing served 14 days after signing of a judgment, 12 days after filing of the judgment with the clerk of the court, and nine days after recordation of

the judgment was timely served when the rules required that it be served not later than 10 days after the entry of the judgment to be reheard.

The District Court of Appeal below had held that the motion had to be served within 10 days of the rendition of the order denying jurisdiction. The Supreme Court overruled on the basis that:

> Rendition meant the judicial act of deciding the controversy and pronouncing the judgment of the court. "Entry" meant the ministerial act, typically the responsibility of the clerk of the court, of "spreading the judgment rendered upon the court's official records.

Casto v. Casto, 404 So.2d 1046 (Fla., 1981), at 1048. Thus the Court, noting that the petition had been served within 10 days of entry of judgment, upheld the petition's validity and ruled it within the jurisdiction of the appeal court.

The Casto opinion cites to Becker v. King, 307 So.2d 855 (Fla. 4th DCA, 1975), cert. dismissed, 317 So.2d 76 (Fla., 1975) in support of its ruling. Becker was a dissolution of marriage case in which a partial final judgment was signed on January 22, 1973, and the judge made final oral communication as to the remaining issues in the case on March 7, 1973. On March 24, 1973, the husband died, two months before written judgment was entered in final form on the issues dealt with on March 7, 1973. An amended judgment was entered again on the March 7, 1973 issues on June 5, 1973.

The issue on appeal in Becker was whether the two nunc pro tunc decisions, unwritten until after the husband's divorce and death, were valid if only orally rendered on the

date of the husband's death. The Fourth District Court of Appeals upheld the orders, stating:

> . . . However essential a filed writing is to an appeal, a judgment may be valid although not in such final form as is required for appeal purposes . . . rendition of a judgment generally refers to the judicial act of the court in giving, returning, pronouncing, or annoucing, orally or in writing, its conclusions and decision on the matter submitted to it for adjudication, and is distinct from the signinging of a subsequent formal judgment and from the later recording or filing of the writing or the entry of judgment in the minutes of the court. Aside from the effect of a statute or court rule requiring the judgment to be written for particular purposes, a judgment exists as such when it is thus rendered and is valid and binding as between parties and their privies, although the only competent evidence of such act is a memorial or record in the form of a written or signed judgment or a clerk's minute book entry.

Becker v. King, 307 So.2d 855 (Fla. 4th DCA, 1975), at 858-859.

As applied to the facts of the instant case, the Appellant's arguments well support such an analysis. Whereas in most of the above cases the timeliness of a Motion for Rehearing or an appeal was at issue, in this case the time for bringing a constitutionally protected right into play is the issue. The court's indulgence in allowing extra time for appeal or rehearing is a matter within the discretion of the court to allow, and also within the scope of the rules since appeal time depends upon written entry of a judgment upon the record.

But under the provisions of F. R. Crim. P. 3.191 (d)(3), written entry or other recorded denial is allow to start the time for trial to commence. It is not the duty of the courts,

but rather that of the state to bring the accused to trial within 90 days of the recorded denial of a motion for discharge, and the state did not do it. The state asked for two additional continuances after written denial of the motion for discharge, while Appellant asked for none. During this period, unlike the post-trial periods of the cases cited supra, Appellant's due process rights were being prejudiced.

At trial, the memories of State witnesses were found to be lacking when questioned concerning interrogation of the defendant with being given his Miranda warnings. State's witnesses have always shown a strong inclination to disagree in this case regarding what roadside tests were given the accused, the details of his answers given to their questions (which would prove the accused's faculties were not impaired). These prejudices, along with the lack of any attempt by the state to take a videotape of the accused at the time of his arrest were compunded with a 14 month period between arrest and trial to provide the jury with a very selective memory at a trial which never should have occurred. These factors, combined with an ongoing investigation of the State's key witness, J.E. Crawley, for filing false reports, which occurred during the time between the denial of accused's original motion for discharge and his second motion for discharge (of which investigation the state's attorney was fully aware), ought to convince any impartial observer that Appellant's speedy trial rights, defined by the four factors elucidated by the United States Supreme Court in the case of Barker v. Wingo, 407 U.S. 514 (U.S., 1972) at 530-533, 33 L.Ed. 101, at 116-118, were indeed violated. (These factors were defined to be length of

delay, cause of delay, defendant's assertion of his speedy trial rights, and prejudice to the defendant). All four factors are present in this case. Fla. R. Crim. P. 3.191 (d)(3) is designed to prevent such abuses, and should have been asserted by both lower courts to prevent them in this case.

III. CONCLUSION

A recorded order denying Appellant's Motion for Discharge was rendered by the trial court judge on July 31, 1984 in this case. Appellant was not tried until well after the lapse of the prescribed 90 days delimited by Fla. R. Crim. P. 3.191 (d)(3), and his subsequent Motion for Discharge in Leon County Court and Petition for Writ of Prohibition in the Second Judicial Circuit Court should have been ruled upon favorably.

Therefore, Appellant requests that this honorable court issue an order compelling the Second Judicial Circuit Court to issue the Writ of Prohibition Appellant previously requested; that the Leon County Court be issued an order vacating its order adjudicating Appellant guilty, putting him on probation, fining him a total of $700.00, compelling him to attend DUI school and mandatory drug counselling, and suspending his driver's license; and that the Leon County Court be issued an order expunging all law enforcement records and court records of any reference to this matter as is allowed by Fla. R. Crim. P. 3.692. Appellant finally requests the court to issue an order awarding him court costs and a reasonable attorney's fee for his efforts in this cause.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of all of this INITIAL BRIEF has been served upon the State's Attorney's Office, Ste. 500, Lewis State Bank Bldg., Tallahassee, FL, by hand service this 6th day of January, 1986.

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