IN THE SUPREME COURT OF THE STATE OF FLORIDA

DANIEL SPARKMAN,
PETITIONER,

V.

CASE NO. 68,020

THE HON. CHARLES McCLURE, JR.
AS COUNTY JUDE OF THE COUNTY
COURT, IN AND FOR LEON COUNTY,
RESPONDENT,

(CORRECTED COVER)
BRIEF OF RESPONDENT ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Appellant, Daniel Sparkman, was charged by Information with driving under the influence of alcohol (DUI) on September 24, 1983. A second Information alleging possession of narcotics "paraphernalia" (sic) was filed on October 10, 1983 (R1)

An amended Information charging both offenses was filed in Leon County Court on January 11, 1984.

Defense continuances were taken on October 21, November 4, and December 9, 1983, as well as January 6 and 31, March 10 and 23, April 15 and 19, 1984. Other delays were occassioned by Court or State continuances.

After Mr. Sparkman's appointed counsel withdrew on June 8, 1984 (R 31) the Appellant assumed responsibility for his own defense. On July 12, 1984, a pro se motion for speedy trial discharge was filed. (R 39) The motion misrepresented that there had been "no defense continuances" and no "waiver of speedy trial since October 13, 1983." (R 39) The motion went on to allege that "speedy trial" ran on April 12, 1984. (R 39)

The motion was set for hearing on July 27, 1984, at which time Mr. Sparkman failed to appear. (R 41) The order actually denying speedy trial discharge was entered on September 13, 1984. (R 52) It is to be noted that between July 27, 1984, and September 13, 1984, Sparkman failed to appear on a scheduled jury trial date (August 24, 1984). (R 48) Although Sparkman failed to appear, a court continuance was taken.

Additional defense (pretrial) motions provoked additional continuances. These motions included motions to polygraph witnesses and to suppress evidence. On November 20, 1984, Sparkman filed a demand for additional discovery, (R 74) while providing reciprocal discovery to the State for the first time. (R 81) Thus, Sparkman proved that he was not ready for trial at any prior time.

On November 28, 1984, Sparkman petitioned for entry of a writ of prohibition. Relief was denied and trial commenced on November 29, 1984.

Sparkman was convicted as charged and, on December 28, 1984, filed a notice of appeal from his conviction. On December 27, 1984, a simultaneous appeal of the denied writ of prohibition was filed.

The State of Florida, noting the existence of two simultaneous appeals (one in Circuit Court and one in the First District), moved for dismissal of the prohibition appeal. The motion was denied.

The District Court affirmed the denial of prohibition and certified this question to this Honorable Court;

> "Whether the time for commencement of trial is measured from the point when the order is announced in open court or the date when the written order is entered, after a denial by a court of a motion to discharge pursuant to Fla. R.Crim.P.3.191(d)(3)

SUMMARY OF ARGUMENT

The question posed to this Court should properly be litigated in the Appellant's pending direct appeal in the Circuit Court.

Nevertheless, the 90 day speedy trial period (if not tolled by Sparkman's failure to appear (twice) for court after filing his motion for discharge and his reopening of discovery) began when the written order of the court denying discharge was filed with the clerk.

POINT I

WHETHER THE TIME FOR COMMENCEMENT OF TRIAL IS MEASURED FROM THE POINT WHEN THE ORDER IS ANNOUNCED IN OPEN COURT OR THE DATE WHEN THE WRITTEN ORDER IS ENTERED, AFTER A DENIAL BY A COURT OF A MOTION TO DISCHARGE PURSUANT TO FLA.R.CRIM. P. 3.191(d)(3)

The submission of a certified question for discretionary review does not require acceptance of said case by this Court. Gillian v. Stewart, 291 So.2d 593(Fla. 1974). It is submitted that review should not be granted in this case.

First, the State would object to review on the basis of the record at bar and the current status of this case.

Mr. Sparkman, after numerous defense continuances, filed a frivolous motion for speedy trial discharge which was a "nullity' under Jones v. State, 449 So.2d 253 (Fla. 1984). Given the false allegations of the motion, as well as post-motion defense demands for discovery and Sparkman's failure to apppear in court on July 27, 1984 and August 24, 1984. It can hardly be said that Sparkman had any desire for, much less a right to, a speedy trial.

Sparkman did file a petition for writ of prohibition on November 28, 1984, without success. On November 29, 1984, Sparkman proceeded to trial and completed same prior to filing his brief in the First District. In addition, Sparkman filed a direct appeal from County to Circuit Court prior to submitting

his brief on the denial of prohibition to the First District Thus, Sparkman was pursuing prohibition "after the fact," see Jennings v. Frederick, 137 Fla. 773, 189 So.1 (1939) and he was appealing an issue in the First District which was available for review in the Circuit Court. Pope v. Joanas, 278 So.2d 305 (Fla. 1st DCA 1973) cert. den. 283 So.2d 564. The State's motion to dismiss this appeal was denied

Having accepted this case for review, the District Court was faced with a rather obvious question: does time run from the filing of the court's written order or its mere oral prouncement?.. While "only able to find one case on point" Casto v. Casto, 404 So.2d 1046 (Fla. 1981), the Court reached a result identical to that reached in any number of analogous cases: State v. Wells, 326 So.2d 175 (Fla. 1976); Billie v. State, 10 F.L.W. 1822 (Fla. 1985); Grant v. State, 438 So.2d 956 (Fla. 4th DCA 1983). That is, time runs from the recording of the Court's written order. As for the "written" requirement itself, we note that a stenographer's transcript, clerk's note or tape recording cannot qualify as a "written and recorded" order. State v. Jackson, 10 F.L.W. 564 (Fla. 1985); State v. Schmidt, 10 F.L.W. 592 (Fla. 1985); State v. Hernandez, 10 F.L.W. 626 (Fla. 1985).

Thus, even if Sparkman is entitled to premature Supreme court review of a case (currently on direct appeal to the Circuit Court) by virtue of a moot writ of prohibition, the question posed does not qualify for discretionary review, but,

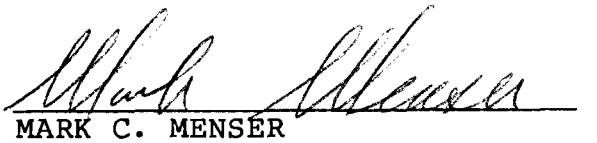
should review be granted, it is clear that time limits involved are triggered by the recording (filing) of the court's written order.

CONCLUSION

The certified question, if answered, should be answered in a manner consistent with the established rule that jurisdictional time periods commence with the filing of a written order.

Respectfully submitted,

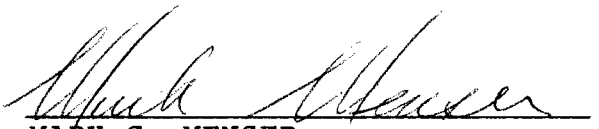
JIM SMITH
ATTORNEY GENERAL



MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Answer Brief of Appellant has been forwarded to Daniel Sparkman, 2197 Raymond Diehl Road, Tallahassee, Florida 32308, on this 21st day of January, 1986.



MARK C. MENSER
ASSISTANT ATTORNEY GENERAL