IN THE SUPREME COURT OF FLORIDA

GENE SALSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

FIFTH DCA CASE NO. 90-405

SUPREME COURT CASE NO. 78,439

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

PAOLO G. ANNINO
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STATEMENT OF THE CASE

On February 17, 1989, Petitioner, Mr. Gene Salser, appeared for first appearance following his arrest for the offense of armed robbery. (R 629) A public defender was appointed to represent Mr. Salser at this time. (R 629) On March 13, 1989, Mr. Salser appeared in court without counsel for purposes of arraignment. (R 632) The State requested a four week continuance and the matter was set for March 16, 1989, for a status review. (R 632) On March 16, 1989, Mr. Salser again appeared in Court without counsel and since the State had still not filed formal charges, Mr. Salser was released without bond as to the charge to Orange County which had a hold on him. (R 633)

On March 3, 1989, the State filed an Information charging Mr. Salser with Robbery with a Firearm in violation of Section 812.13(2)(a), Florida Statutes (1989). (R 634) On June 29, 1989, Mr. Salser sent a letter to the clerk of the court informing them that he was currently incarcerated in Orange County Jail and desired to appear for his court appearance in front of Judge McGregor in July. (R 635) On July 3, 1989, Mr. Salser did not appear for arraignment and a bench warrant was issued for his arrest. (R 636) However, this bench warrant was recalled on August 4, 1989. (R 638)

On August 10, 1989, Mr. Salser filed a pro se motion for discharge on the grounds that the State had failed to bring him to trial within the period permitted by the speedy trial rule. (R 657, 699) On August 15, 1989, the State filed a motion to strike

the motion for discharge. (R 644 - 645) On November 6, 1989, Mr. Salser appeared before the Honorable Robert B. McGregor, Circuit Judge, for a hearing on his motion for discharge. It was noted that the motion was filed on August 10 and the motion to strike was filed on August 15, but that no hearing was ever held on either motion. (R 590 - 591) Judge McGregor determined that Mr. Salser was represented by the Public Defender's Office and granted the State's motion to strike the pro se motion for discharge. (R 601) Defense counsel argued that the trial court had no authority since it failed to comply with the dictates of the speedy trial rule by failing to hold a hearing within five days of the motion. (R 594 - 597)

On November 17, 1989, Mr. Salser filed a petition for writ of prohibition with the Fifth District Court of Appeal. (R 678 - 707) By order dated November 22, 1989, the Fifth District Court of Appeal denied the petition for writ of prohibition. (R 752)

Mr. Salser proceeded to jury trial on the charge on November 27 - 28, 1989, with the Honorable Robert B. McGregor, Circuit Judge, presiding. (R 1 - 494) Following deliberations, the jury returned a verdict finding Mr. Salser guilty as charged. (R 486, 723)

On January 18, 1990, Mr. Salser again appeared before Judge McGregor for sentencing. (R 501 - 588) The State presented certified copies of prior judgments and sentences in an effort to show that Appellant qualified for sentencing as an habitual offender. (R 767 - 810) Judge McGregor determined that Mr. Salser

met the criteria for the habitual offender treatment and adjudicated him to be an habitual offender. (R 585) Judge McGregor then adjudicated Mr. Salser guilty and sentenced him to life in prison consecutive to the sentences imposed in Orange County. (R 585, 815 - 819)

Mr. Salser filed a timely Notice of Appeal on February 12, 1990. (R 821 - 822) Mr. Salser was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R 827)

On May 23, 1991, the Fifth District Court of Appeal affirmed Mr. Salser's conviction. Judge Cowart issued a written Dissenting Opinion.

On July 10, 1991, Mr. Salser's Motion for Rehearing, Rehearing En Banc, and Request for Certification was denied.

On August 9, 1991, Petitioner, Mr. Salser, filed a timely Notice to Invoke Jurisdiction.

STATEMENT OF THE FACTS

Inasmuch as Petitioner is raising no issue regarding the sufficiency of the evidence to support his conviction, the following brief summary of the facts is presented:

On the evening of February 16, 1989, a man entered the Pizza Hut Restaurant in Sanford and demanded money from the assistant manager. (R 133 - 135) The man had his hand in his pocket and exposed the barrel end of a firearm. (R 136) The man who robbed the Pizza Hut was identified by several people as Petitioner. (R 145, 203, 219) The police were immediately called and a description of the assailant was released via police radio. (R 271) Captain Charles Fagan saw a man matching the description of the person who had committed the robbery and followed him in his police vehicle. (R 272 - 273) Several other police vehicles joined in the chase which ended up in a field to the side of State Road 17-92. (R 274 - 276, 241 - 246) The person who was driving this car was identified as Petitioner. (R 248, 279)

A gun was found within ten feet of the passenger side of Petitioner's car. (R 323) Five live rounds of .38 caliber bullets were found in Petitioner's possession. (R 247) These bullets were compatible with the gun that was found. (R 303) A total of $230 was recovered from the ground right outside the passenger side window of Petitioner's car and from Petitioner's person. (R 337, 346, 383) Five of the bills recovered from Petitioner's person had serial numbers which matched the serial numbers of the so-called bait money taken from the register of the Pizza Hut. (R 399 - 406)

SUMMARY OF THE ARGUMENT

Based on Rules 9.030(a)(2)(A)(ii) and (iv), Florida Rules of Appellate Procedure, Petitioner requests this Court to accept jurisdiction. The majority and dissenting opinion in the instant case expressly construes Article I, Section 16 of the Florida Constitution. The majority holds that a defendant, who was appointed counsel, does not have right to file a pro se Motion to Discharge; whereas, the dissent, relying on State v. Tait, 387 So.2d 338 (Fla. 1980), holds that a defendant has a qualified right to dual representation.

In addition, the majority opinion expressly and directly conflicts with this Court's decision in State v. Tait, 387 So.2d 338 (Fla. 1980), which decision holds that a defendant has a qualified right to dual representation.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT APPEAL IN SALSER V. STATE, CASE NO. 90-405 (FLA. 5TH DCA MAY 23, 1991) EXPRESSLY CONSTRUES ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

This Court should accept jurisdiction because the majority and dissent in the instant case both construed Article I, Section 16 of the Florida Constitution. Article I, Section 16 of the Florida Constitution provides in relevant part that "[i]n all criminal prosecutions the accused ... shall have the right ... to be heard in person, by counsel, or both ... ." (Emphasis added).[1]

In the instant case, the Petitioner, Mr. Salser, while sitting in jail and not having an overwhelming caseload to deal with, patiently counted his speedy trial days. The trial court appointed an Assistant Public Defender at his first appearances, and at his following two court hearings, he stood unrepresented. (R 629, 632, 633) Mr. Salser continued counting the days. When the chalk marks on the jail wall (figuratively, of course) added up to 175 days, Mr. Salser filed a Motion for Discharge. (R 657, 699) Again, he waited. The mandatory five day hearing on his Motion to Discharge passed without a hearing. Two months later, the trial court finally deals with Mr. Salser's motion and strikes it, based on the State's Motion to Strike. (R 601) The trial court held that Mr.

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[1] Four other States have virtually identical language (i.e. or "both") in their respective state constitutions: Georgia, Mississippi, South Carolina and Texas. See, Burney v. State, 244 Ga. 33, 257 S.E.2d 543 (1979); Gray v. State, 351 So.2d 1342 (Miss. 1977); State v. Sanders, 269 S.C. 215, 237 S.E.2d 53 (1977) and Lenders v. State, 550 S.W.2d 272 (Texas Crim. App. 1977)

Salser's pro se motion to discharge was a nullity, because he was represented by a Public Defender.

The issue in this case is what does the word "both" mean in our state constitution. Although appointed an Assistant Public Defender, did Mr. Salser have the right to file a pro se Motion to Discharge? The plain language of Article I, Section 16 supports Mr. Salser's position. To quote again, "in all criminal prosecutions the accused ... shall have the right ... to be heard in person, by counsel, or both ... ." (Emphasis added) Judge Cowart, in his dissenting opinion in the instant case, stated:

> While this provision has been interpreted as giving the accused a qualified, not an absolute, right to self representation, State v. Tait, 387 So.2d 338 (Fla. 1980), if the constitutional language means anything it is that an otherwise valid pro se motion which would entitle the accused to discharge cannot be denied simply because the accused, rather than his court-appointed counsel, filed it.

Id. at D.2 The majority, also relying on State v. Tait, 387 So.2d 338 (Fla. 1980), came to the opposite conclusion and held that a "criminal defendant does not have the right to a hybrid representation." Id at 4, 5.

Notwithstanding the opinion of the majority in the instant case, the Tait decision stands for the proposition that a defendant has "a qualified, not an absolute right to self-representation. When the accused is represented by counsel, affording him the privilege of addressing the court or the jury in person is a matter of the sound discretion of the court." Id. at 340. This Court interpreted Article I, Section 16 to provide a

defendant a qualified right to dual or "hybrid" representation.[2]

The Tait decision left open the issue of the boundaries of this qualified right. In Hybrid Representation: An analysis of a Criminal Defendant's Right to Participate as Co-counsel at Trial, 10 Stetson L.Rev. 191 (Winter 1981), Mr. J. Allison DeFoor II and Mr. Glenn H. Mitchell succinctly stated the outcome of the Tait decision.

> ...[I]ts embrace of the Thompson holding, that the "qualified" right to dual representation status is subject to the "sound discretion of the [trial] court," raises more questions than it resolves. Unfortunately, the court did not offer any guidelines or criteria for the exercise of such discretion. The court has, in effect, sanctioned a qualified right, without even suggesting the qualifications. The court has therefore left the issue open for future judicial interpretation.

Id. at 211.

Eleven years after the Tait decision, Petitioner is asking for guidelines on his qualified right. In the instant case, Mr. Salser's pro se Motion to Discharge was not a burden on the trial court. Also, Mr. Salser's motion to discharge was not inconsistent with the strategy of his appointed counsel. The majority opinion in the instant case denies Mr. Salser his qualified right. Mr. Salser requests this Court to accept this case and to provide long awaited guidelines on the qualified right to dual representation.

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[2] Another source of finding jurisdiction in the instant case is Rule 9.030(a)(2)(A)(iv). The majority opinion in the instant case expressly conflicts with State v. Tait, 387 So.2d 338 (Fla. 1980), because the majority opinion denies there is a qualified right to dual representation.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the petitioner request that this Honorable Court exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Gene Salser, No. A-328757, P.O. Box 667, Bushnell, FL 33513, this 19th day of August, 1991.

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

GENE SALSER,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

FIFTH DCA CASE NO. 90-405

SUPREME COURT CASE NO. _____

APPENDIX

JAMES B. GIBSON
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90-388
MB

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1991

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

GENE SALSER,

Appellant,

v.

CASE NO. 90-405

STATE OF FLORIDA,

Appellee.

'opinion filed May 23, 1991

Appeal from the Circuit Court
for Seminole County,
Robert B. McGregor, Judge.

James B. Gibson, Public Defender, and Michael S. Becker, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David S. Morgan, Assistant Attorney General, Daytona Beach, for Appellee.

GRIFFIN, J.

Appellant was convicted of armed robbery and has raised on appeal the failure of the trial court to grant his *pro se* motion for discharge under the speedy trial rule. We affirm.

Appellant was arrested for the armed robbery of a Pizza Hut in Seminole County on February 16, 1989. On February 17, 1989, appellant made his first appearance in court and, upon his request, a public defender was appointed to represent him. On March 13, 1989, he appeared for arraignment but because the

state still had not .filed formal charges against him, the court set a status review for March 16, 1989. On that date, with charges still not filed, he was released to Orange County where he was to be prosecuted on another armed robbery charge.

On March 23, 1989, the state filed an information charging appellant with robbery with a firearm of the Pizza Hut, and arraignment was scheduled for July 3, 1989. On June 29, 1989, the appellant sent a letter to the clerk of the Seminole County court stating that he was incarcerated in the Orange County Jail and that, due to his incarceration, he was unable to appear.[1] Appellant did not appear for the scheduled arraignment on July 3 and a bench warrant was issued for his arrest. This bench warrant was, however, recalled on August 4, 1989, in preference for issuance of a writ to Orange County.

On July 18, 1987, the assistant public defender assigned to appellant's .case served on the state a notice of discovery and motion for statement of particulars; The assistant public defender also sent appellant a letter, dated July 25, 1989, requesting appellant get in touch with his office. Appellant admits he received this letter around August 1,' 1989, but he did not respond until September 11, 1989.[2] On August 10, 1989, appellant filed a *pro se* motion for discharge on the ground that the state had failed to bring him to trial within the period required by the speedy trial rule. According to the certificate of service, a copy of this motion was sent to the state

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1 Appellant also requested the court to make the "proper arrangements concerning this matter."

2 In this letter he sends counsel his *pro se* filings, instructs counse to file a writ of prohibition to prevent trial based on his motion for discha ge, instructs counsel to prepare an order for the court to return to him the property confiscated when he was arrested, and advises counsel that he had recently been convicted of the Orange County armed robbery.

attorney but was not sent to the public defender, Nor does the court file reflect the document was filed until it became an attachment to another *pro se* filing of the appellant dated September 29, 1989.[3] When the assistant state attorney received a copy of the *pro se* motion for discharge, he filed, on August 15, 1989, a motion to strike the *pro se* filing because appellant was represented by counsel.'

A writ of habeas corpus was issued by the Seminole County court to bring appellant to Seminole County on August 21 for appearance before the court. On August 16, 1989, the writ was reported unexecuted because Orange County was Unwilling to release him to Seminole County until his Orange County trial, which was scheduled to begin that same week, was completed. Accordingly, appellant was finally brought to court in Seminole County on September 18, where he appeared along with his public defender. On September 29, 1989, the appellant filed a *pro se* motion to dismiss based upon the failure of the state to bring him to trial within ten days from his previously filed motion for discharge. On October 16, 1989, he also filed a *pro se* motion to be "co-counsel". On November 6, the trial court held a hearing on appellant's motion for discharge and struck all motions filed *pro se*, including the motion for discharge. On November 7, 1989, the assistant public defender filed a motion for discharge.[4] On November 13, the trial court timely held a hearing on the

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[3] *See infra* n.4.

[4] From the record it appears that, in Seminole County, the filing of a motion for discharge automatically generates a form notification from the clerk of court advising the trial judge of the filing of the motion for discharge and the time deadlines applicable under Rule 3.191. According to the document, telephone notice is also given to the judge's secretary. This notice was generated in response to the November 7, 1989 motion. There is no record in the file of an earlier notice.

motion for discharge and set trial for November 22. The state, defense counsel and appellant executed and filed a stipulation extending the speedy trial window until November 27, the next normal business day for the court after November 22. The trial took place on November 27, 1989, and the jury found the appellant guilty. Appellant, who had previously been sentenced to life imprisonment as an habitual offender in Orange County, was again sentenced to life imprisonment as a habitual offender in Seminole County.

Appellant contends that, pursuant to Florida Rule of Criminal Procedure 3.191 and controlling case law, the state was without the power to try him because he was not given the required hearing within five days of the filing of his *pro se* motion for discharge, nor was he tried within ten days of the hearing deadline. The state asserts the trial court correctly struck the *pro se* motion for discharge and was not required to act upon it in accordance with the Rule 3.191 procedure because it was not Tiled or signed by appellant's counsel.

Although criminal defendants represented by counsel frequently file *pro se* motions, there is relatively little case law treating this issue. The leading case, *Johnson v. State,* 501 So.2d 94 (Fla. 1st DCA 1987), is typical of the fact pattern involved in such cases and is similar to the present case. In *Johnson,* the First District Court of Appeal concluded that a *pro se* motion for discharge was a nullity and that the defendant's remedy, if any were appropriate, would be a motion for post-conviction relief based on ineffective assistance of counsel. *See also Beverly v. State,* 516 So.2d 30 (Fla. 1st DCA 1987) (citing State v. Tait, 387 So.2d 338 (Fla. 1980)).

This court, in a similar situation, struck a *pro se* pet tion for writ of *error, coram nobis* filed by an appellant who was represented by counsel on

appeal. We pointed out that the defendant may have the right under certain circumstances to waive counsel and represent himself but the defendant has no right to be represented for the purposes that suit him and unrepresented for other purposes. *Sheppard v. State,* 391 So.2d 346, 347 (Fla. 5th DCA 1980).

Courts in other jurisdictions we have identified that have considered this issue agree that such *pro se* motions are invalid. *United States v. Bergman,* 813 F.2d 1027, 1030 (9th Cir.), *cert. denied,* 484 U.S. 852, 108 S.Ct. 154, 90 L.Ed.2d 110 (1987); *Martin v. State,* 797 P.2d 1209, 1217 (Alaska Ct. App. 1990); *People v. Smith,* 557 N.Y.S.2d 132 (N.Y.A.D.2d 1990), *appeal denied,* 77 N.Y.2d 882, ___ N.E.2d ___ (N.Y. 1991). In *United States v. Durden,* 673 F.Supp. 308 (N.D. Ind. 1987), the court considered the legal effect of a *pro se* motion for a hearing on the admissibility of a coconspirator's statements. The court initially noted that a criminal defendant does not have the right to a hybrid-representation. Further, by requesting counsel, the defendant waived his right to self-representation. *Id.* at 309. Referring to the impossible burden placed on the court,[5] especially where the motions filed or positions taken by client and counsel are inconsistent, the *Durden* court refused to consider the *pro se* motion.

We conclude *the* trial court correctly refused to discharge appellant,

AFFIRMED.

SHARP, W., J., concurs.

COWART, J., dissents with opinion.

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[5] As expressed by the trial court in the present case: "I can't let the two of you work in different directions or at least different routes at the same time."

COWART, J., dissenting.

The defendant's pro se motion for discharge under the speedy trial rule should not be treated as a nullity. Certainly, generally a defendant charged with a crime and his counsel (or even two lawyers acting as co-counsel) cannot simultaneously conduct or proceed in different tactical directions. However, that impracticality is not a problem in this case. See State v. Smiley, 529 So.2d 349 (Fla. 1st DCA 1988).

The defendant, charged in Seminole County with a crime, was sitting in a jail cell in Orange County, watching the calendar much more closely than his court-appointed counsel, and filed a timely and proper pro se motion for discharge under the speedy trial rule long before his counsel filed a similar motion. The appointment of counsel for a defendant accused of a crime should result only in benefit to him, not in detriment. If, in any given case, the defendant himself is more alert, attentive and diligent in the pursuit of his rule right to be discharged for failure of the State to provide a speedy trial,[1] and properly moves the court to effectuate a remedy resulting from a violation of the speedy trial right, he should not be deprived of that

[1] See Florida Rule of Criminal Procedure 3.191(i)(3).

remedy merely because the prosecution does not meet its duty to provide the defendant with his right to a speedy trial and the defendant has had counsel appointed who is inattentive to his client's rights and needs and ineffective and dilatory in asserting his client's right to a discharge for the State's neglect to provide a speedy trial.

Article I, section 16 of the Florida Constitution provides in relevant part that "[i]n all criminal prosecutions the accused...shall have the right...to be heard in person, by counsel, or both... ." (Emphasis added). While this provision has been interpreted as giving the accused a qualified, not an absolute, right to self representation, State v. Tait, 387 So.2d 338 (Fla. 1980), if the constitutional language means anything it is that an otherwise valid pro se motion which would entitle the accused to discharge cannot be denied simply because the accused, rather than his court-appointed counsel, filed it. If these two little words, and the constitutional right they embody, have been read out of the constitution they should be read back in.

This not a case where there is a conflict with the defendant personally demanding a speedy trial while defense counsel is seeking a continuance in order to prepare for trial. The right to a speedy trial is a fundamental constitutional right. A pro se motion for discharge under the speedy trial rule places no impossible or inordinate burden on the trial court. In the context of the facts of this case the argument of inconvenience to the court has been greatly exaggerated. It should take no

more judicial labor to consider the motion on its merits and grant it when meritorious, than *to* consider the State's motion to strike the defendant's pro se motion for discharge.