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IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 78,439

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

PETITIONER'S BRIEF ON MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
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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, far 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 26, 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. On November 27, 1991, this Court issued its order accepting jurisdiction and setting oral argument.

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

Article I, Section 16 of the Florida Constitution provides that in all criminal prosecutions the accused shall have the right to be heard in person, by counsel, or both. This Court has previously held that this provision gives an accused a qualified right to self representation. The Fifth District Court of Appeal has apparently rejected this interpretation and held that Petitioner had no right to file a pro se motion for discharge simply because at some point previously counsel had been appointed to represent him. Such a ruling in effect holds that an accused may be denied basic fundamental rights simply because he is nominally represented by appointed counsel who does nothing to protect his client's rights. Such a holding is absurd and must be quashed.

Alternatively, this Court should simply apply the speedy trial rule and hold that the trial court erred by refusing to timely hold a hearing on a motion to discharge and thus lost jurisdiction to further rule in the case. In either situation, this Court should rule that Petitioner must be discharged.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL BELOW MISCONSTRUES ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION IN THAT IT HOLDS THAT AN INDIGENT DEFENDANT REPRESENTED BY COUNSEL HAS NO RIGHT TO PROCEED PRO SE DURING THE PERIOD OF REPRESENTATION.

The decision of the Fifth District Court of Appeal below affirmed the trial court's decision to strike Petitioner's pro se motion for discharge because it was filed at the time he was represented by appointed counsel. In essence, the Fifth District Court of Appeal held that a person represented by counsel has no right to proceed pro se during the period of representation. Petitioner asserts that this holding is in clear conflict with Article I, Section 16 of the Florida Constitution and the Sixth Amendment to the United States Constitution.

Petitioner was arrested on Seminole County charges on February 16, 1989. (R 622) Thereafter, because the State failed to timely file charges, Petitioner was released to Orange County where he had similar charges pending. (R 633) However, on June 26, 1989, Petitioner sent a letter to the clerk of the court informing that office that he was in the Orange County Jail and noted that he had a court appearance in front of Judge McGregor in July. According to a notation by the clerk, a copy of this letter was sent to the State Attorney's office on June 28, 1989. (R 635) Petitioner filed a pro se motion for discharge on August 10, 1989, alleging that one hundred and seventy-five (175) days had passed since his arrest. (R 699,657) The only response to this motion

to discharge was a motion to strike filed by the State on August 15, 1989. (R 644-645) No hearing on the motion to discharge was held until November 6, 1989. (R 589-606) At that hearing, the trial court simply granted the State's motion to strike the motion for discharge on the grounds that Petitioner was represented by the Public Defender's Office and therefor could not file a pro se motion for discharge. (R 601) Defense counsel argued that under the Speedy Trial Rule the trial court was required to hold a hearing within five days of the filing of the motion for discharge. (R 594-597) Failing to hold this hearing within the prescribed time does not permit the court to later strike the motion for discharge. (R 594)

On appeal, the Fifth District Court of Appeal affirmed the decision of the trial court. Salser v. State, 582 So.2d 12 (Fla. 5th DCA 1991) The court held that the pro se motion for discharge was a nullity since Petitioner was represented by counsel at the time that the motion was filed. In so ruling, the court aligned itself with the First District Court of Appeal in Johnson v. State, 501 So.2d 94 (Fla. 1st DCA 1987) where the court 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.

In a sharply worded dissent, Judge Cowart held that the pro se motion for discharge should not be treated as a nullity. As he noted, Article I, Section 16 of the Florida Constitution

provides in relevant part that "in all criminal prosecutions the accused ... shall have the right ... to be heard in person, by counsel, or both ..." (emphasis added) Noting that this Court in State V. Tait, 387 So.2d 338 (Fla. 1980) ruled that this provision of the Constitution has been interpreted as giving an accused a qualified right to self representation, Judge Cowart concluded that if this Constititional 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. Judge Cowart further noted that in the instant case, there was no conflict between the Petitioner personally demanding a speedy trial and whatever trial preparation his appointed counsel was doing. Judge Cowart concluded that it would not have placed any undue burden on the trial court to simply rule on the motion for discharge on its merits since it expended the same amount of time and consideration on the State's motion to strike.

In Faretta v, California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1974) the United States Supreme Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. The Supreme Court once again noted that the Sixth Amendment right to the assistance of counsel implicitly embodies a correlative right to dispense with the lawyer's help. The Court further noted that the right to assistance of counsel was intended to supplement the other rights of the defendant and not to impair

the absolute and primary right to conduct one's own defense in propria persona. 422 U.S. at 816. Both the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution provide certain rights which must be given to the accused. As the United States Supreme Court noted in Faretta:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused: it grants to the accused personally the right to make his defense.

422 U.S. at 819. It is the accused's right to have a speedy trial, not the lawyer's right to secure a speedy trial for his client.

In essence, the Fifth District Court of Appeal by its decision has ruled that the right to a speedy trial can be denied simply because an accused has a less-than-diligent lawyer who never seeks to enforce the right on behalf of his client. Such a conclusion is absurd. In Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985) this Court noted: "Just as the accused has the right to assistance of counsel, he also has the right to assist his counsel in conducting the defense." Id. at 211.

In State v. Tait, 387 So.2d 338 (Fla. 1980) this Court ruled that Article I, Section 16 of the Florida Constitution provides that an accused has a qualified right to self-representation. When the accused is represented by counsel, the question of affording him the privilege of addressing the court on his own behalf is a matter left to the sound discretion of the court. Despite this clear statement by this Court, the Fifth District Court of Appeal in the majority opinion below, ruled that

there simply is no qualified right to dual representation. In this regard, the decision is clearly erroneous.

Petitioner is not contending that in all cases an accused who is represented by counsel should be permitted the absolute right to proceed pro se at the same time. However, the instant case presents one of those circumstances wherein he should be permitted the right to proceed in a fashion which protects his own rights. To rule otherwise, would in fact, deny Petitioner his right to secure basic fundamental rights.

Petitioner asserts that this Court can decide the instant case without reference to the Constitutional question by simply interpreting Rule 3.191, Florida Rules of Criminal Procedure which sets forth the procedure for enforcing the speedy trial rule. In the case of a felony charge, the Rule provides that the accused must be brought to trial within one hundred seventy-five (175) days of being taken into custody. The Rule further provides that upon expiration of this time period, a motion for discharge is timely. Rule 3.191(i)(3), Florida Rules of Criminal Procedure provides:

> No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and unless the court finds that one of the reasons set forth in Section (d)(3) exists, shall order that the defendant be brought to trial within 10 days. If the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime. (emphasis added)

This provision has been interpreted as placing a duty on the State to afford an accused a hearing and where the State fails to timely

hold this hearing, the trial court loses jurisdiction to thereafter conduct a trial on the charges. Ariza v. Cvzmanick, 548 So.2d 304 (Fla. 5th DCA 1989); Lenard v. Moxley, 497 So.2d 973 (Fla. 5th DCA 1986); and Massev v. Graziano, 564 So.2d 287 (Fla. 5th DCA 1990).

In the instant case, Petitioner filed his motion for discharge on August 10, 1989. It is clear that neither the State nor the trial court timely held a hearing on Petitioner's motion for discharge. In fact, no hearing was held until some three months later at which time the trial court simply struck the motion for discharge. At this hearing, defense counsel argued that the only option to the trial court upon receiving the motion for discharge is to hold a hearing. Failing to do so does not permit a trial court to later strike a motion for discharge.

Petitioner asserts that the State's motion to strike his pro se motion for discharge solely because he was represented by counsel was incorrectly granted. First, it is true that at Petitioner's First Appearance hearing held on February 17, 1989, the Judge appointed a public defender to represent Petitioner. (R 629) However, at the next two scheduled court appearances on March 13, 1989, and March 16, 1989, Petitioner appeared without counsel. (R 632,633) Thus, it was certainly reasonable for Petitioner to assume that he did not have a public defender representing him. Second, Petitioner should be able to assert his rights under the speedy trial rule personally. To deny him this right simply because at some point months earlier, counsel had been appointed and did nothing to protect Petitioner's rights, amounts to a denial

of effective assistance of counsel. Third, the instant case is not a situation where Petitioner was trying to handcuff his appointed counsel. There is nothing in the record to indicate that either Petitioner or his counsel were not prepared to go to trial within 15 days of the filing of the motion for discharge.

Petitioner further notes that the decision below is in conflict with a previous opinion by the same court in Cain v. State, 565 So.2d 875 (Fla. 5th DCA 1990). In that case, the defendant and his attorney could not agree on the exercise of peremptory challenges. The trial court permitted the defendant to exercise the peremptories personally, against the judgment of his attorney who had conducted the voir dire examination, On appeal, the Fifth District Court of Appeal affirmed and held that where trial strategy is concerned, it is the defendant personally who must make the ultimate decision even when he is represented by counsel. Certainly, the decision to seek discharge for violation of speedy trial is a matter of trial strategy. As such, the defendant should personally have the final say on whether to exercise this right. The right to counsel means nothing if it can be used to thwart the other rights of a criminal defendant.

In summary, Petitioner asserts that the decision of the Fifth District Court of Appeal below is incorrect insofar as it holds that a defendant is prohibited from personally exercising any of his constitutionally protected rights simply because at some point earlier counsel has been appointed to represented him. In a case such as this, where the Petitioner is much more diligent at

protecting his constitutional rights than his court appointed counsel, he should not be punished for the ineffectiveness of his counsel. Further, Rule 3.191, Florida Rules of Criminal Procedure provides that upon the timely filing of the motion for discharge, the State is absolutely required to hold a hearing on such a motion within 5 days. Failure to hold this hearing precludes the trial court from later exercising jurisdiction over the case. The decision of the Fifth District Court of Appeal below must be quashed with instructions that Petitioner be discharged.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the Petitioner requests that this Honorable Court to quash the decision of the Fifth District Court of Appeal and remand the case with instructions that Petitioner be discharged.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

Michael S. Becker

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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 on December 23, 1991.

Michael S. Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 78,439

APPENDIX

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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David A. Snyder and Richard Dolan, Miami, for appellee.

Before NESBITT, FERGUSON, and LEVY, JJ.

PER CURIAM.

An insurer appeals an order granting summary judgment in favor of an insured claiming personal injury protection (PIP) benefits. We reverse.

[1] Elizabeth Gregory pulled her van into a self-service Shell gas station. She noticed wet concrete on the ground near the pumps as she walked into the station office to pay. Gregory walked back to the service island and re-fueled. She then returned to the office, picked up some juice, and concluded her transaction. Upon leaving the office, she acknowledged an acquaintance and began her return to her van. At that point, Gregory slipped on what she termed "greasy soap." When she tried to stop her fall, her feet went up, and her left hand and arm contacted the van. She fell over and her back hit the tank platform causing her injury. The trial court granted Gregory's motion for summary judgment finding the insurer liable for the PIP benefits sought.

Under sections 627.736(1) and (4)(d)(1), Florida Statutes (1987), an insured must meet two requirements before being entitled to PIP benefits. First, her injury must be "arising out of the ownership, maintenance, or use of a motor vehicle." Second, her injury must be sustained "while occupying a motor vehicle," or "while not an occupant ... if the injury is caused by physical contact with a motor vehicle."

In the instant case, Gregory was re-fueling. We have no problem with finding the injury arose out of the ownership, maintenance, and use of the vehicle. That determination is not controlling, however, since we conclude Gregory clearly did not meet the statute's occupancy or contact requirement. As conceded by her counsel, Gregory was not occupying the vehicle when she was injured. She had not been in the vehicle for some minutes before the fall. Nor was her injury caused by physical contact with the vehicle. According to Gregory's own testimony, it was the "greasy soap", which caused her to slip. On her descent, her arm did hit the van; however, her injury was not caused by physical contact with the van.

[2] Traditional tort concepts of causation are to be considered part of the personal injury protection statute. The mere involvement of a motor vehicle is not enough. Causation is the necessary link that connects a plaintiff's injuries to the physical contact and brings them within the statute. *Lumbermens Mut. Cas. Co. v. Castagna*, 368 So.2d 348, 349 (Fla.1979).

Accordingly, summary judgment in Gregory's favor is reversed. The case is remanded for the trial court to enter judgment as a matter of law in favor of the insurer.

Gene SALSER, Appellant,

v.

STATE of Florida, Appellee.

No. 90–405.

District Court of Appeal of Florida, Fifth District.

May 23, 1991.

Rehearing Denied July 10, 1991.

Defendant was convicted of armed robbery following refusal to grant defendant's pro se motion for discharge under the speedy trial rule by the Circuit Court, Seminole County, Robert B. McGregor, J. Defendant appealed. The District Court of Appeal, Griffin, J., held that defendant's pro se motions to discharge and dismiss charges were invalid since they were not signed by public defender which had appeared on behalf of defendant at defendant's request.

Affirmed.

Cowart, J., dissented with opinion.

Criminal Law ⇐641.10(3)

Pro se motions to discharge and dismiss armed robbery charges on grounds of alleged speedy trial rule violation were invalid since motions were not signed by public defender who had previously been assigned and appeared on defendant's behalf on defendant's request; thus, trial court's refusal to discharge defendant was appropriate. West's F.S.A. RCrP Rule 3.191; U.S.C.A. Const.Amend. 6.

James B. Gibson, Public Defender, and Michael S. Becker, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David S. Morgan, Asst. Atty. Gen., Daytona Beach, for appellee.

GRIFFIN, Judge.

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, 1989, 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 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

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 counsel to file a writ of prohibition to prevent trial based on his motion for discharge, 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.

3. *See infra* n. 4.

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.[4] On November 13, the trial court timely held a hearing on the 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 filed 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* petition 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, 98 L.Ed.2d 110 (1987); *Martin v. State*, 797 P.2d 1209, 1217 (Alaska Ct.App.1990); *People v. Smith*, 162 A.D.2d 734, 557 N.Y.S.2d 132 (1990), *appeal denied*, 77 N.Y.2d 882, 568 N.Y.S.2d 925, 571 N.E.2d 95 (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] es-

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.

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."

pecially 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.

W. SHARP, J., concurs.

COWART, J., dissents with opinion.

COWART, Judge, dissenting.

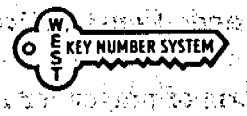
The defendant's pro se motion for discharge under the speedy trial rule should not be treated as a nullity. Certainly, generally a defendant charged with a crime and his counsel (or even two lawyers acting as co-counsel) cannot simultaneously conduct or proceed in different tactical directions. However, 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 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 is 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.

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



RITE-WAY PAINTING & PLASTERING, INC., a Florida corporation, Appellant,

v.

Williard TETOR and Velma Tetor, Appellees.

No. 90-02366.

District Court of Appeal of Florida, Second District.

May 24, 1991.

Rehearing Denied July 17, 1991.

Subcontractor brought action against owners asserting mechanic's lien fore-