OA 4-10-92

IN THE SUPREME COURT OF FLORIDA

GENE SALSER,

Petitioner,

v. CASE NO. 78,439

STATE OF FLORIDA,

Respondent.
_____/

MERITS BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

The state disagrees with the defense statement to the extent that it is favorable to the defendant.[1] The following statement is presented in a fashion conducive to approving the decision of the district court in which the judgment and sentence were affirmed.

The defendant was arrested on February 16, 1989 (R 622).

At the request of the defendant, the public defender's office was appointed at first appearance on February 17, 1989, to represent him (R 626). The representation was for the duration of the cause unless otherwise ordered by the court:

ORDER APPOINTING PUBLIC DEFENDER

> In reliance upon the above representations of the Defendant, it is hereby
> ORDERED that the Defendant be declared indigent within the meaning of Section 27.52, Florida Statutes, (1979) and it is further
> ORDERED that the Office of the Public Defender of the Eighteenth Judicial Circuit is hereby appointed to represent the defendant in this case until relieved by Order of the Court.
> DONE AND ORDERED in Sanford, Seminole County, Florida, this 17 day of February, 1989.
>
> s/
> JUDGE

(R 626)

The information charging the defendant with armed robbery was filed on March 23, 1989 (R 634; *note* that the initial merits

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1 The parties are referred to as the defendant and the state. References to the record are indicated "(R and page)"; those to the initial merits brief, if any, are denoted "(B and page)".

brief appears to have a typographical error, as it indicates that the document was filed on the third of March (B 1)).

Counsel for the defendant filed a demand for discovery on July 18, 1989 (R 637). The state timely served its answer on August 2, 1989 (R 640).

Although the record reveals that the defendant served the state attorney with a motion to discharge on August 10, 1989 (R 658; 700; *see also* R 644-645), the motion was not filed in the trial court. The index to the record on appeal reflects the dates of filing. Volume IV indicates that a copy of an earlier issued bench warrant was filed in the clerk's office on August 9, 1989 (R 642). The next document filed, court minutes, was entered on August 14, 1989 (R 643).

The motion for discharge was never independently filed with the court. It was not submitted until October 12, 1989, when it was filed as a mere exhibit to the defendant's motion to dismiss (R 657).

On November 6, 1989, a hearing was held on the motion to dismiss (R 589-606). Although the trial judge stated that he was striking all of the *pro se* pleadings that had been filed while the defendant was represented by the public defender's office (R 601), the written order on the motion to discharge indicated that the motion was granted to the extent that the state was bound by the mandatory time limits of the rule (R 676).

The parties, including the defendant personally, stipulated to an extension of the ten day speedy trial period and that a trial commenced by November 27, 1989, would be considered timely

(R 709-710). An order to that effect was rendered (R 710). Trial commenced on that date (R 1, *et seq.*).

SUMMARY OF ARGUMENT

The district court correctly affirmed as the trial court properly followed the dictates of the Florida Rule of Judicial Administration 2.060(d) by not considering a *pro se* motion for discharge when the defendant was represented by counsel. Rather than rendering the rule ambiguous by issuing a decision that allows conduct contrary to the clear dictates of the rule, it would better serve the interests of judicial economy to require defendants such as Salser to seek the already available means of seeking relief by alleging ineffectiveness of counsel in a motion for post conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850.

Moreover, the facts of this case are poor ones upon which to carve out an exception to the requirements of the rule. The defense does not appear to have been ready for trial when the defendant served the state with the *pro se* motion for discharge. The answer to the demand for discovery was not filed until a mere eight days before. Furthermore, the instant defendant simply failed to file the motion in the trial court. As a result, the requirements of the speedy trial rule were not activated because the court was not presented with the motion.

ARGUMENT

THE DISTRICT COURT OF APPEAL COURT OF APPEAL CORRECTLY AFFIRMED BECAUSE THE TRIAL COURT PROPERLY FOLLOWED A RULE OF PROCEDURE ESTABLISHED BY THIS COURT.

"The plain language of the rules promulgated by the Supreme Court of Florida are binding upon the trial and appellate courts." *State v. Battle*, 362 So.2d 782, 783 (Fla. 3d DCA 1974) (citations omitted). "Rules of practice and procedure adopted by this Court are binding on the court and the clerk as well as litigants and counsel." *State v. Lott*, 286 So.2d 565, 566 (Fla. 1973) (citations omitted); *see also In re Hill v. HCA Health Seruices of Florida, Inc.*, 582 So.2d 701, 704, n. 3 (Fla. 1st DCA 1991) (citations omitted). Florida Rule of Judicial Administration 2.060(d) provides in material part:

> Every pleading and other paper of a party represented by an attorney shall be ***signed by at least one attorney*** of record . . . The signature of an attorney shall constitute a certificate by him that he has read the pleading or other paper; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay. *If a* ***pleading is*** *not* ***signed*** or is signed with intent to defeat the purpose of this rule, ***it may be stricken*** *and* ***the action may proceed as though the pleading or other paper had not been served.***

Fla.R.Jud.Admin. 2.060(d) (emphases added); *see also Beverly v. State*, 516 So.2d *30*, 31 (Fla. 1st DCA 1987), *held* "pro se motion for discharge filed while appellant was being represented by court-appointed counsel is a nullity." In *accord Johnson v. State*, 501 So.2d 94, 96 (Fla. 1st DCA 1987).

There was no reason for the district court below to interpret the above rule as its terms are unambiguous. When an accused is represented by legal counsel the attorney must sign pleadings that are filed in the court. The policy behind the rule is

obvious. The rule ensures that the heavily burdened trial courts do not have to expend limited time considering frivolous matters. This consideration is especially important because of the accelerated schedule triggered by the filing of a motion for discharge. The speedy trial rule provides in material part:

> 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.

Fla.R.Crim.P. 3.191(i)(3).

As this court is aware, it and other appellate courts routinely strike *pro se* pleadings of appellants who are represented by legal counsel. A trial court faced with a motion for discharge does not have the luxury of time enjoyed by appellate courts. Scheduling of a hearing within five days is mandatory without consideration of the court's docket.

"A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternate theory supports it." *Caso v. State*, 524 So.2d 422, 424 (Fla. 1988) (citations omitted); *see also Combs v. State*, 436 So.2d 92, 96 (Fla. 1983). More specifically, "[i]f there is any theory upon which the trial court might properly have denied petitioner's motion for discharge, then the district court was correct in affirming, even though the trial court's stated or indicated reasons be erroneous." *Stuart v. State*, 360 So.2d 406, 408 (Fla. 1978) (citation omitted). Under the facts of this case there are additional reasons to deny relief to the defendant.

The public defender's office was appointed to represent the defendant on February 17, 1989 (R 626). The defendant served a copy of the *pro se* motion for discharge upon the state attorney's office on August 10, 1989 (R 658; 700). However, it is not clear that he was entitled to discharge. The speedy trial rule also provides:

> (3) ***Delay and Continuances; Effect on Motion.*** If trial of the accused does not commence within the periods of time established by this Rule, a pending motion for discharge shall be granted by the court unless it is shown that (i) a time extension has been ordered under (d)(2) and that 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 the 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.

Fla.R.Crim.P. 3.191(d)(3).

The record suggests that the defense may very well have been unprepared for trial (subsection (iii)). Counsel for the defendant filed a demand for discovery on July 18, 1989 **(R 637).** The state timely served its answer on August 2, 1989 (R ***640).*** Assuming, ***arguendo,*** that thew defendant was somehow prejudiced by his attorney's actions, the appropriate remedy is not to permit defendants such as the defendant to file *pro se* pleadings in derogation of the procedural rules. Rather, as the First District Court of Appeal pointed out in *Johnson,* ***supra,*** such individuals can seek post conviction relief by alleging ineffectiveness of counsel. *Id.,* 96.

The district court below did not in effect decide that one who is represented by counsel has no right to represent him or herself during the period of representation (B 6). To the contrary, the *Salser* decision is limited to the issue of filing *pro se* pleadings before trial. The state constitution provides that "in all criminal prosecutions the accused . . . shall have the right . . . to be heard in person, by counsel or both . . ." Art. I, §16, Fla. Const. This court has already interpreted this clause as providing "a qualified, not an absolute, right to self-representation." *State v. Tait*, 387 So.2d 338, 340 (Fla. 1980). This court concluded "that article I, section 16 does not embody a right of one accused of crime to representation both by counsel and by himself." *Id.* The claim that an accused is entitled under the decision in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1974), to simultaneous legal counsel and self-representation was directly rejected:

> Although recognizing th[e] right of self-representation, . . . the *Faretta* decision does not establish a right to the "hybrid" form of representation which respondent sought. The sixth amendment does not guarantee that the accused can make his own defense personally *and* have the assistance of counsel.

387 So.2d at 339-340; *see also* *Whitfield v. State*, 517 So.2d 23 (Fla. 1st DCA 1987); *Sheppard v. State*, 391 So.2d 346, 347 (Fla. 5th DCA 1980).

The Eleventh Circuit Court of Appeals has held similarly. "It is the law of this circuit that the right to counsel and the right to proceed *pro se* exist in the alternative and the decision to permit a defendant to proceed in a hybrid fashion rests in the sound discretion of the trial court." United *States v. LaChance*, 817

F.2d 1491, 1498 (11th Cir. **1987)** (citations omitted), ***cert. denied*** **484 U.S.** 928, **108** S.Ct. **295, 98** L.Ed.2d 255 (1987). Other federal appellate courts have held the same. ***See United States v. Treff,*** **924 F.2d** 975, 979, n. 6 (10th Cir. **1991);** United ***States v. Payne,*** 923 **F.2d** 595, 598 (8th Cir. **1991);** ***United States u. Niuica,*** **887** F.2d 1110, **1121 (1st** Cir. **1989);** ***Neal v. State of Texas,*** **870** F.2d **312, 315** (5th Cir. **1989);** ***United States v. Tarantino,*** **846 F.2d 1384,** 1420 (D.C. Cir. **1988);** ***United States v. Bergman,*** **813** F.2d **1027, 1030** (9th Cir. 1987), **held** no abuse of discretion in refusing to acknowledge ***pro se*** pleadings of defendant who was represented by counsel; ***United States v. Mosely,*** **810** F.2d **93, 97-98** (6th Cir. **1987).**

Perhaps most importantly, the instant defendant did **not** file the motion for discharge in the trial court. The index to the record on appeal reflects the dates of filing. Volume IV indicates that a copy of an earlier issued bench warrant was filed in the **clerk's** office on August **9, 1989** (R 642). The next document filed, court minutes, was entered on August **14, 1989** (R **643). The** motion for discharge was never independently filed with the court. It was not submitted until October 12, **1989,** when it was filed as exhibit number 4 to the defendant's motion to dismiss (R **657;** ***see also Salser v. State, 582*** So.2d 12, **13** (Fla. 5th **DCA 1991)).** This court **has** held:

> Florida's speedy trial rule, Florida Rule of Criminal **Procedure** 3.191, protects **a** constitutional right enunciated in Florida's Declaration of Rights, article I, section **16,** Florida Constitution. This fundamental right is neither unwaivable nor self-executing.

Johnson v. ***State,*** 442 So.2d 193, 196 (Fla. 1983).

The "filing of such a motion . . . is the only procedural means by which a defendant may trigger any right whatever afforded by the speedy trial rule." *State v. Velez*, 524 So.2d 1157, 1158 (Fla. 3d DCA 1988) (citations omitted). As the defense never filed the motion for discharge, other than as a mere attachment to other later motions, the defendant simply never triggered the speedy trial rule and was, therefore, not entitled to relief in the trial court.

In short, the district court correctly affirmed as the trial court properly followed the dictates of Florida Rule of Judicial Administration 2.060(d) by not considering a *pro se* motion for discharge when the defendant was represented by counsel. Rather than rendering the rule ambiguous by issuing a decision that allows conduct contrary to the clear dictates of the rule, it would better serve the interests of judicial economy to require defendants such as Salser to seek the already available means of seeking relief by alleging ineffectiveness of counsel in a motion for post conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850.

Moreover, the facts of this case are poor ones upon which to carve out an exception to the requirements of Florida Rule of Judicial Administration 2.060. *Cf. Jones v. State,* 484 So.2d 577, 579 (Fla. 1986). The defense does not appear to have been ready for trial when the defendant served the state with the *pro se* motion for discharge. The answer to the demand for discovery was not filed until a mere eight days before, Furthermore, the instant defendant simply failed to file the motion in the trial

court. As a result, the requirements of the speedy trial rule were not activated because the court was not presented with the motion.

CONCLUSION

The decision of the Fifth District Court of Appeal should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Michael S. Becker, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, FL 32114, by interoffice delivery on this 24th day of January, 1992.

DAVID S. MORGAN
ASSISTANT ATTORNEY GENERAL