IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC02-2167

ALFRED J. WAGNER,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In its statement of the case and facts, the State correctly asserts the following:

The Fifth District Court dismissed the State's petition for writ of certiorari as untimely. The petition was filed April 25, 2002, challenging Respondent's January 23, 2002 release pending his civil commitment trial. State v. Wagner, 825 So. 2d 453 (Fla. 5th DCA 2002).

The respondent adds the following facts:

The trial judge, the Honorable Alan A. Dickey, Circuit Judge, on January 23 initially announced that he was ordering Respondent released pending trial "subject to a formal order... I'd ask [defense counsel] to draw an order, and I'll find the fifteen days for the State to appeal to begin upon rendition of the order." Wagner, 825 So. 2d at 454. (Slip op. at 2-3; see appendix to state's merits brief.) Later in the hearing defense counsel commented "I take it that he actually is not going to be released until the formal order is signed and transmitted," and the judge responded "I just signed an order saying that he's to be released from custody immediately." Id., 825 So. 2d at 455; slip op. at 3.

The State notes in its statement of the case and facts that the order signed at the end of the hearing is entitled "court

minutes," that the signature line is handwritten, that the signature is illegible, and that it is unclear from the page in question what action was being ordered. (State's brief on the merits at 2-3.) The Fifth District Court, in its opinion issued below, held that "[t]he trial judge... signed the court minutes, which provided, in pertinent part: "Defendant to be released immediately from custody." Wagner, 825 So. 2d at 455; slip op. at 4.

The State argues in its statement of the case and facts that "[i]t appears the District Court felt obligated to [hold as it did] based on its own prior precedent." (State's brief on the merits at 4) The respondent does not accept that argument as factual, and will argue the legal issues below.

SUMMARY OF ARGUMENT

The trial judge announced in the parties' presence that Respondent would be released pending his trial; the judge further announced that *he had just signed an order to that effect*. The record shows that a handwritten order signed by the judge to that effect, which is styled "open court minutes," was in fact rendered on the day of the hearing. A second order was filed which set out the procedural history and the reasons for the earlier order, but which did not substantively change the earlier order.

The Fifth District Court of Appeal correctly held below that the filing of the first order started the jurisdictional clock running for the State to seek review. The District Court correctly dismissed the State's review petition, which was filed three months after the first order was rendered in the parties' presence.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE STATE'S UNTIMELY PETITION FOR WRIT OF CERTIORARI; ITS DECISION AND OPINION SHOULD BE APPROVED.

In this case, the trial judge announced in the parties' presence on January 23, 2002, that the respondent would be released pending his trial, and further announced that *he had just signed an order to that effect*. The record shows that a handwritten order signed by the judge, which states "[d]efendant to be released immediately from custody," and which is styled "open court minutes," was in fact rendered on that date. (R 304) A longer order was filed in March; that order set out the procedural history and the court's reasons for the earlier order, but "neither contain[ed] any substantive changes nor resolve[d] any genuine ambiguity in" the earlier order. State v. Wagner, 825 So. 2d 453 (Fla. 5th DCA 2002), citing State v. Brown, 629 So. 2d 980 (Fla. 5th DCA 1993). The Fifth District Court of Appeal correctly held below that the January events started the jurisdictional clock running for the State to file any notice, or petition, it intended to file seeking review of the release order.

The District Court correctly dismissed the State's April petition for review, because it was filed too late to vest

jurisdiction in the appellate court. Dismissal is the appropriate remedy when a party files an untimely petition for certiorari review. Overstreet v. Davis, 219 So. 2d 34 (Fla. 1969); Princess Cruises, Inc. v. Edwards, 611 So. 2d 598 (Fla. 2d DCA 1993). The State argues that the District Court's holding dismissing its petition is wrong, because the trial judge announced on the date of release that he still intended to file the more elaborate follow-up order setting out written reasons for his ruling, for the appellate court's benefit. As the District Court correctly held in this case, jurisdiction exists or it does not. State v. Wagner, 825 So. 2d 453, 455 (Fla. 5th DCA 2002); slip op. at 5. Where a written order is signed by the court and filed with the clerk of the court, it has been "rendered" for the purpose of appeal, and neither the parties' agreement or misconception to the contrary, nor the style or format of the order, alters that jurisdictional effect of the court's action. Id. The later filing of a more detailed written order does not have the effect of retroactively tolling the time for appeal from the first written order. Brown, supra.

The State suggests that this court should hold that whether an order is *served* on the parties disposes of whether the clock has started to run for appellate purposes, citing Rule 1.080(h), Florida Rules of Civil Procedure. While Rule 1.080(h)(1) does

provide that copies of orders and judgments "shall" be served on all parties, 1.080(h)(3) provides that "[t]his subdivision is directory and a failure to comply with it does not affect the order or judgment or its finality or any proceedings arising in the action." The State raises the specter of court minutes that are signed by a judge ***without*** notice to the parties; it argues that such orders may someday unfairly be deemed, unless Wagner is reversed, to have started the jurisdictional clock running. A party who does not receive timely notice that a judgment, or another appealable order, has been entered has the recourse of a belated appeal (or vacation and re-entry of the offending order, see Bennett v. Ward, 667 So. 2d 378, 380 n. 3 (Fla. 1st DCA 1995).) Since the trial judge in this case announced in the parties' presence in open court that he was filing the order in question, the notice issue is not before this court.

The State further argues that public policy favors delay of the start of the appeal clock until such time as trial judges enter detailed orders. Detailed written findings and rulings are, Respondent readily concedes, good for the fair and efficient administration of justice; however, nothing in the procedural rules prevents such orders from being produced after notice of appeal has been filed in cases such as this one. Filing a follow-up order which is designed to create a better

record for appeal, and which does not materially change the previously announced action of the trial court, is deemed a ministerial act "on [a] procedural matter relating to the cause." San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991). The trial courts have concurrent jurisdiction to enter such orders *nunc pro tunc* before an appellate record is transmitted. San Martin; Rule 9.600(a), Florida Rules of Appellate Procedure. See Whack v. Seminole Memorial Hospital, 456 So. 2d 561, 563-64 (Fla. 5th DCA 1984) (*nunc pro tunc* order properly "memorializes a previously taken judicial act"); Becker v. King, 307 So. 2d 855, 859 (Fla. 4th DCA), cert. denied, 317 So. 2d 76 (Fla. 1975); Trawick, Florida Practice and Procedure, §15-3 at 238 (2003 ed.). Cases where a court after jurisdiction has been divested for the first time files a written order, or enters an amended order based on new information, or enters an amended order that materially changes the action previously taken, are distinguishable, as those actions cannot be taken *nunc pro tunc*. See Carridine v. State, 721 So. 2d 818 (Fla. 4th DCA 1998); Holland v. State, 634 So. 2d 813, 815 (Fla. 1st DCA 1994); D.M. v. State, 580 So. 2d 634 (Fla. 1st DCA 1991). Here, as noted above, the court's second written order "neither contain[ed] any substantive changes nor resolve[d] any genuine ambiguity in" the earlier order. Wagner, 825 So. 2d at 455, citing Brown.

Accordingly the first order started the appeal clock running, and the second order would properly have been considered by the appellate court, had it had jurisdiction, as evidence of the trial court's intentions. See Becker v. King, supra, 307 So. 2d at 859.

This court should rule that its jurisdiction was improvidently granted in this matter, as there is no conflict between this case and any other appellate court decision. The State argues that this case conflicts with the decision and opinion in State v. Tremblay, 642 So. 2d 64 (Fla. 4th DCA 1994), and is "inconsistent with" the decision and opinion in Employers' Fire Insurance Co. v. Continental Insurance Co., 326 So. 2d 177 (Fla. 1976). In Employers' Fire Insurance, this court held that handwritten minute book entries, which were once made by Circuit Court clerks to memorialize courtroom events, were "an unreliable guide by which to measure...appellate... time," since "it is impossible to... uniformly complete [such] entries at the end of each day" and since "[i]n some trial courts, the entries for an entire week are signed at one time on Friday afternoon." 326 So. 2d at 180 and n.7. The desktop computer has altered record-keeping procedures to such a degree that the rationale of Employers' Fire Insurance should no longer be deemed to govern the question raised in this case. The State

tacitly acknowledges as much, by asserting that the decision in this case is "inconsistent with," rather than in jurisdictional conflict with, Employers' Fire Insurance.

In State v. Tremblay, the case relied on to establish direct conflict, the Fourth District Court held that filing of a "status form" that "reflect[ed]" dismissal of a criminal charge did not constitute rendering of an order for jurisdictional purposes, even though the form was signed by the judge. There is no indication in Tremblay that the "status form" at issue there contained case-specific handwritten text directing executive-branch personnel to undertake a particular act, like the order that was signed by the judge in this case, which specifically directed "Defendant to be released immediately from custody." Wagner, 825 So. 2d at 455. In any event, nothing in the Tremblay opinion suggests that the court *brought to the parties' attention the fact that it was signing an order*, a fact which would have put them on notice that the time for appeal might be running.

The Tremblay panel acknowledged that there are some situations where signing and filing a form *could* properly be deemed to confer jurisdiction on a reviewing court. This case involves a reasonable decision, by another appellate panel, that on the facts of this case an appealable directive in fact

issued, although the judge may have used a form styled "court minutes." This case and Tremblay can coexist both in principle and in practice; this court should dismiss this matter, and let stand the decisions in this case and in Tremblay, which on a reasonably careful reading are neither conflicting nor confusing.

If this court disagrees and accepts jurisdiction, it should approve the Fifth District's well-reasoned decisions and opinions in this case and in State v. Brown, supra. In that event this court should either reverse Tremblay, or note that the opinion in that case is not sufficiently fact-specific to establish whether it falls within the reasonable rule of Wagner.

CONCLUSION

The respondent asks this court to rule that jurisdiction was improvidently granted in this matter.

If this court decides this case on the merits, the respondent asks this court to approve the decision and opinion of the Fifth District Court of Appeal.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing has been served on Assistant Attorney General Judy Taylor Rush, of 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32117, by way of the Attorney General's in-box at the Fifth District Court of Appeal, this 16th day of June, 2003.

_____
Nancy Ryan

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Courier New 12-point font.

_____
Nancy Ryan