IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC02-2167

Fifth DCA Case No. 5D02-1211

ALFRED J. WAGNER,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The order of the District Court is erroneous in its holding that court minutes signed by a trial judge constitute an order from which the jurisdictional time periods for the filing of an appeal, or a petition seeking an extra-ordinary writ, run. The trial court and the parties intended that the March 26th order be the one from which appeal, or review, would be taken. The trial court specified that the appeal time would run from the March 26th order. The January 23rd release of Wagner was merely a charitable act not intended to affect the time for the taking of an appeal, or the filing of a certiorari petition. Everyone was on notice that the appeal would be from the March 26th order.

The March 26th order was the complete order of the trial court which ended his judicial labor on the issue. It is order from which the jurisdictional time period began to run. The State's petition was timely, and the District Court's order should be vacated.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL'S DISMISSAL OF THE STATE'S PETITION FOR WRIT OF CERTIORARI FOR LACK OF JURISDICTION BASED UPON ITS HOLDING THAT COURT MINUTES SIGNED BY A TRIAL JUDGE CONSTITUTE AN ORDER FROM WHICH JURISDICTIONAL TIME PERIODS RUN SHOULD BE QUASHED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS ON THE TIMELY-FILED PETITION.

In his answer brief, Wagner contends that the District Court's holding in the instant case is supported by its own prior holding in *State v. Brown*, 629 So. 2d 980 (Fla. 5th DCA 1993). (AB 5). To the extent that the District Court so concluded, *see State v. Wagner*, 825 So. 2d 453 (Fla. 5th DCA 2002), it is wrong.

In *Brown*, the trial court signed a form entitled "Court Minutes," and "Order (Motion Hearing)." 629 So. 2d at 980. The judge specifically "'X'd the blanks preceding both the words "Court Minutes" and "Order (Motion Hearing)," indicating that the form was **both** the court minutes and an order of the court. *Id*. This made it clear that the judge intended the form to be the order of the court disposing of the matter at the time that he signed and filed it with the clerk. That he later decided to issue an additional order does not defeat the clear intent existing at the time the minutes/order form was completed, signed, and filed by the judge.

In Wagner's case, the judge made it quite clear that the court minutes were not his order. 825 So. 2d at 454-55. It is likewise clear that all participants shared in that understanding. *Id*. While the judge permitted Wagner to be released in anticipation of his final order, the court minutes, on which the release was notated, were clearly not the final order of the court, i.e., the one that ended judicial labor on the issue. *See Employers' Fire Ins. Co. v. Continental Ins. Co.,* 326 So. 2d 177, 181 (Fla. 1976). Thus, *Brown* does not support the holding in Wagner's case, and *Employer's Fire* compels a different result than that reached by the District Court below. *See also State v. Tremblay,* 642 So. 2d 64 (Fla. 4th DCA 1994)[signed clerk's form is not the order from which jurisdictional time periods run]. The March 26th order ending the court's judicial labor on the issue of Wagner's release was the order from which the jurisdictional time for the filing of the petition began to run.

Next, Wagner claims that the "notice issue is not before this court" because "the trial judge in this case announced in the parties' presence in open court that he was filing the order in question . . .." (AB 6). The notice given by the court to the parties was that the yet-to-be-prepared order would be the appealable one. *See* 825 So. 2d at 454-55. Everyone present

understood that to be the case, and no one disagreed with it below. *Id*. Thus, the notice issue is clearly before this Court and compels the conclusion that the March 26th order is the reviewable one.

Contrary to Wagner's claim in this Court, the State does not contend that "whether an order is *served on* the parties disposes of whether the clock has started to run for appellate purposes." (AB 5 (emphasis in original). However, it asserts that whether the document is served on the parties is germane to whether it is a rendered order under the appellate rules. As argued in the initial brief, all of the circumstances surrounding the signing of the court minutes and the entry of the March 26th order, including the failure of service of the court minutes and the accomplishment of service of the March 26th order, compel the conclusion that the March 26th order was the rendered order. Thus, it was the one which started the jurisdictional "clock" running.

Next, Wagner claims that nothing prevents a trial court from entering "detailed orders" after the notice of appeal has been filed. (AB 6). He says that filing such an order would be a mere "ministerial act" amounting to no more than a procedural matter. (AB 6). According to him, as long as this is done before the appellate record is transmitted, and the order is made *nunc*

pro tunc to the date of the original order, the appellate court could consider the later order in deciding any appeal of the earlier one. (AB 6-7). He cites *San Martin v. State*, 591 So. 2d 301 (Fla. 2d DCA 1991) as his authority for this proposition.

In *San Martin*, the court concluded that "the trial court had concurrent jurisdiction to prepare a replacement order. A *nunc pro tunc* order, which merely replaces a lost order, is a "procedural matter relating to the cause on appeal." 591 So. 2d at 301. Clearly, that is very different than the circumstances of the instant case.

In this case, the detailed order was always intended by everyone to be the order to be appealed. It was not a replacement for a complete, but lost, order. It was *the* order.

Wagner's release was authorized early in anticipation of the entry of the March 26th order. He should not be permitted to use the court's willingness to give him the benefit of what he knew would be a provision of the unwritten order to come to defeat the court's expressed intention that the order to come be the appealable order. Clearly, the trial court did not intend to thwart the State's right to an appeal; indeed, he intended to further the cause of justice by carefully and fully setting out his complete order. In light of the clear intent that his release order be fully reviewed, it is apparent that the trial

court would not have released Wagner on January 23rd had he believed that doing so would preclude review of the complete order filed on March 26th. Thus, the early release was an act of charity, and it would be a travesty of justice to permit it to preclude review of the release order entered on March 26th.

Finally, Wagner argues with this Court's decision to accept jurisdiction in this case. (AB 7-9). Should this Court consider that argument, the State reasserts its argument made in its jurisdictional brief and incorporates same by this reference.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court approve the decision of the Fourth District Court of Appeal in *State v. Tremblay*, quash the decision of the Fifth District Court of Appeal in the instant case, and remand this case to the District Court for further proceedings on the State's timely petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the above and foregoing brief on jurisdiction has been furnished to Nancy Ryan, Assistant Public Defender, Attorney for Respondent, 112 Orange Ave., Daytona Beach, FL 32114, via the Appellate Public Defender's basket at the Fifth District Court of Appeal, on this 7th day of July, 2003.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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