

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NO.

L.App. Case No.: 07-25-AP (Collier County)

L.T. Case No.: 07-81-MOA-RC

CITY OF MARCO ISLAND,

Petitioner/Appellant,

v.

DAVID DUMAS,

Respondent/Appellee.

PETITION FOR WRIT OF MANDAMUS

PURSUANT TO Rule 9.100, Fla. R. App. P., Petitioner, CITY OF MARCO ISLAND (the "City" or "Petitioner"), petitions this court for a writ of mandamus compelling the Appellate Division of the Twentieth Judicial Circuit Court in and for Collier County, Florida (the "Appellate Panel") to reinstate the City's appeal of a final order ("Final Order"). The Final Order, dated November 26, 2007, is the only order discharging the municipal violation/misdemeanor charge against Respondent DAVID DUMAS ("Dumas" or "Respondent") that was the subject of the trial court action below. This Final Order was timely appealed by the City on December 7, 2007.

In support thereof, the City states as follows:

I. Overview and Basis for Invoking Jurisdiction

This Petition for Writ of Mandamus is needed to correct clear error committed by the Appellate Panel in its order dismissing the appeal, dated January 16, 2009 (the "Appellate Dismissal Order").¹ The Appellate Panel incorrectly determined that an interlocutory order, dated October 25, 2007 and preceding entry of the Final Order, was a final, appealable order in the underlying cause. In doing so, the Appellate Panel misapprehended the law and what had in fact transpired below.

Faced with the interlocutory order dated October 25, 2007, the City's Assistant Attorney advised the trial court, by correspondence dated November 16, 2007, that its October 25, 2007 order was not a final order, presented it with clear legal authority on point, and provided the trial court with a proposed order that ended the judicial labor on the case by dismissing the charge pending against Dumas.² The correspondence stated:

With regard to the Pretrial Conference held on November 16th, and the Court's statement that it intended for the Order of October 25th to be final, it appears that said order is not appealable. *State v. Calloway*,

¹ A copy of the Appellate Dismissal Order is attached hereto as Appendix "1." A copy of the Motion to Dismiss the Appeal and the City's Response thereto are attached hereto as Appendixes "2" and "3," respectively.

² See correspondence dated November 16, 2007 and related enclosures, a copy of which is attached hereto as Composite Appendix "4."

589 So. 2d 326, 327 (Fla. 5th DCA 1991)(copy of which is enclosed for your ready reference).

Accordingly, I have prepared the enclosed proposed Order of Dismissal. Assuming that the Order will meet with your Honor's approval, we have enclosed herewith stamped, addressed envelopes for all counsel for record. Of course, if the Order need to be modified in any way, please have your judicial assistant contact the undersigned, so that appropriate modifications may be made.

In response to the correspondence, the trial court properly entered the Final Order on November 26, 2007.³ The City timely filed its Notice of Appeal from the Final Order, on December 7, 2007.⁴

Ignoring clear legal authority, the Appellate Panel treated the interlocutory order, dated October 25, 2007, as a final order; it then, compounded this error by failing even to consider the Final Order in its Appellate Dismissal Order. As a result of these errors, the Appellate Panel dismissed the City's timely appeal. The Appellate Dismissal Order constitutes not only error, but a clear miscarriage of justice, and undermines the well-enshrined principle that courts must resolve cases on their merits. *See, e.g., Brown v. AmeriStar, Inc.*, 884 So. 2d 1065 (Fla. 2d DCA 2004); *Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75, 79 (Fla. 5th DCA 2006)(referencing long-standing policy favoring resolution of matters on the merits).

The Court has authority to correct the Appellate Dismissal Order by issuance of a writ of mandamus compelling the Appellate Panel to reinstate the City's

³ A copy of the Final Order is attached hereto as Appendix "5."

⁴ (R. 269). See fn15, *infra*.

appeal, pursuant to Article V, Section 3(b)(8) of the Florida Constitution and Rules 9.030(c)(3) of the Florida Rules of Appellate Procedure. *See also, Lombardo v. Haige*, 971 So. 2d 1037 (Fla. 2d DCA 2008)(mandamus is the appropriate remedy, where an appellate court improperly declines to exercise jurisdiction because it has incorrectly concluded that the appeal was untimely).

II. Background and Statement of the Facts

1. By its Petition, the City asks the Court to issue a writ of mandamus compelling the Appellate Panel to accept jurisdiction to hear the City's appeal on the merits. The Appellate Dismissal Order was incorrect as a matter of law. The Final Order, dated November 26, 2007, was the only final, appealable order entered in the cause below. See Fla. R. App. P. 9.140 (c). Only the Final Order ended the trial court's judicial labor. The trial court's prior order, dated October 25, 2007, was not a final order (the "October Order")(R. 252-62).⁵ The City's Notice of Appeal was accordingly timely.

2. The Appellate Dismissal Order failed to fully consider the events of Record and their legal significance.

A. The Action Below.

3. The Appellate Dismissal Order incorrectly recites that the action below was one "brought by Appellee to challenge the constitutionality of a local ordinance."⁶ In fact, the proceedings below⁷ concerned the prosecution of Appellee

⁵ A copy of the October Order is attached hereto as Appendix "6."

⁶ See Appendix 1, at page 2.

Dumas for violation of Marco City Ordinance 06-05 (the "Ordinance")(R. 25-33)⁸ -- a criminal misdemeanor punishable by fine.⁹ Appellee Dumas waived arraignment, entered a plea of not guilty and demanded trial by jury. (R. 19)

4. The proceedings had been initiated in the County Court Criminal Division, with court papers expressly referencing the matter as a "Criminal Action."¹⁰ By way of a stipulated motion and order, the City Attorney was substituted for the State Attorney who had been assigned to prosecute the case. (R.57-60, 263-64).

5. During the pendency of the proceedings, Appellee Dumas filed a Motion to Dismiss the charges against him (R. 20-33), which he later voluntarily withdrew. (R. 96).¹¹

⁷ A true and correct copy of the Master Index of the Record on Appeal is attached hereto as Appendix "7." To the extent documents are referenced for foundational purposes only, they are cited to the record, but not included in the Appendix.

⁸ While not directly relevant to this proceeding, the underlying Ordinance involved regulation relating to certain anchoring and mooring activities.

⁹ A copy of the Notice to Appear to answer the charge or pay the fine (R. 1-18) is attached hereto as Appendix "8."

¹⁰ Entries from the Clerk's Motion Notes further reflect the criminal nature of the proceedings, referencing "trial and sentencing notes." (R. 96-100). A copy of these notes are attached hereto as Appendix "9."

¹¹ See Collier County Misdemeanor Case Information form attached hereto as Appendix "10," at page 2 (10/12/07 entry). Dumas' prayer for relief stated: "the Defendant asks that this Honorable Court dismiss the Defendant's pending charges." (R. 33). The motion recognizes that an additional act beyond the Constitutional Challenge was needed to terminate the lower court proceedings.

B. The Constitutional Motion.

6. Appellee Dumas instead proceeded to challenge the constitutionality of the Ordinance by way of a “Motion to Declare Marco City Ordinance 06-05 Unconstitutional and Unconstitutional In Its Application (the “Constitutional Motion”)(R. 34-56).¹² The only relief that Appellee Dumas requested by the Constitutional Motion was a declaration that the Ordinance under which he was prosecuted was unconstitutional.¹³

7. Following an evidentiary hearing on October 12, 2007(R. 96-100), the trial court took the Constitutional Motion under advisement (R. 100).

8. The October Order, dated October 25, 2007, is the order by which the trial court declared the Ordinance, in part, unconstitutional. (R.252-262). The detailed, 11-page October Order considered multiple arguments and granted the Constitutional Motion in part. Significantly here, the October Order did not expressly determine the guilt or innocence of Appellee, did not dismiss any charge

¹² A true and correct copy of the Constitutional Motion is attached hereto as Appendix “11.” The Constitutional Motion did not request dismissal or discharge of the charge against Dumas. To suggest the court intended such a result in its October Order would mean the court erroneously granted Dumas relief beyond the scope requested in its Constitutional Challenge. *See Lee County Electric Cooperative, Inc. v. Cook*, 604 So. 2d 911 (Fla. 2d DCA 1992)(indicating relief that goes beyond that requested by motion or pleading is improper).

¹³ *See* Appendix “11,” final page (R. 56), stating: “WHEREFORE, the Defendant asks that this Honorable Court grant the Defendant’s Motion to Declare the Ordinance Unconstitutional.”

or cause against him, did not dismiss any party to the suit, and contained no explicit warning or words of finality. *Id.*

C. The Pre-Trial Hearing, Entry of the Final Order and Appeal.

9. Following the trial court's entry of the October Order, the Court and the parties proceeded to Pretrial Hearing on November 16, 2007. At that hearing, the trial court advised the parties that in its view, the October Order was a final order. The trial court did so only verbally, and not by way of an executed order.¹⁴

10. As described, the City Attorney on that same day wrote to advise the trial court of its position that the October Order was not a final order. The City's counsel presented the trial court with *State v. Calloway*, 589 So. 2d 326, 327 (Fla. 5th DCA 1991), and courteously submitted a draft of the Final Order for execution by the trial court, assuming it met with the trial court's approval.

11. The trial court did not modify or reject the Final Order; rather, the trial court entered the Final Order on November 26, 2007.

¹⁴ See Notes, Appendix "9" (11/16/07 entry). The trial court's verbal pronouncement was not contained in the October Order. Under the rules of appellate procedure, the time to appeal runs from rendition of an order. "Rendition" requires that the ruling be reduced to writing, signed by the judge and filed in court. *Castro v. Castro*, 404 So. 2d 1046 (Fla. 1981); *State v. Moore*, 563 So. 2d 115 (Fla. 2d DCA 1990); Rule 9.020(g), Fla.R.App.P.

12. The City filed its Notice of Appeal on December 7, 2007 (R. 269), less than 15 days after the rendering of the Final Order, in compliance with Rule 9.140 (c)(3) of the Florida Rules of Appellate Procedure.¹⁵

III. Nature of the Relief Sought

The City seeks issuance of a writ of mandamus. Mandamus is an appropriate remedy in this case, since the Appellate Panel has declined to review the merits of the City's appeal. The Appellate Panel incorrectly held that the City's appeal was untimely. *See, e.g., Lombardo v. Haige*, 971 So. 2d 1037 (Fla. 2d DCA 2008); *Griffin v. Sistuenck*, 816 So. 2d 600, 601 (Fla. 2002) ("mandamus is appropriate remedy to correct determination of lack of jurisdiction"). Its dismissal of the City's appeal was erroneous and mandamus is the proper remedy to compel the Appellate Panel "to assume jurisdiction and proceed to a determination of the cause." *See Flagship Nat'l Bank of Miami v. Testa*, 429 So. 2d 69, 70 (Fla. 3d CA 1983). Given the clear legal error, and the course of events as reflected in the Record, the City's timely and proper appeal should be reinstated.

IV. Argument

The Appellate Panel erred in dismissing the City's Appeal and misapplied the law governing the appeals of the orders in this case. In particular, the Appellate Dismissal Order: (a) failed to follow *State v. Calloway*, 589 So. 2d 326 (Fla. 5th DCA 1991), under which the October Order clearly could not be final and

¹⁵ As set forth in the Notice of Appeal: "The nature of the Order is a final order dismissing a prosecution for violation of a municipal ordinance." A copy of the Notice of Appeal is attached hereto as Appendix "12."

appealable; and (b) failed to recognize that only the Final Order, not the October Order, met the test for finality under applicable Florida law. Issuance of a writ of mandamus is needed to avoid a miscarriage of justice against the City and the constituency it represents. The City has a clear interest in preserving its appellate rights, particularly with respect to the Ordinance that was enacted for the benefit and protection of its residents. .

A. The Appellate Panel Improperly Ignored the Correct Statement of the Law in *Calloway*.

The Appellate Panel erred when it failed to apply the Fifth District's decision in *State v. Calloway*, 589 So. 2d 326 (Fla. 5th DCA 1991).¹⁶ In *Calloway*, the Defendant was charged with violation of a municipal loitering ordinance. The trial court found the ordinance unconstitutional and an appeal was taken. The appeal raised two points, one addressing the constitutionality of the ordinance, and the second, the suppression of evidence. *Id.* The first issue is applicable and persuasive on this record. In a *per curiam* opinion, the Fifth District found that the trial court's order "which merely declared [an] ordinance unconstitutional was not an appealable order." *Id.* at 327.

As the City's counsel advised the trial court in its November 16, 2007, post-pretrial conference correspondence, that *Calloway* precluded the trial court from finding that the October Order was final and appealable. In its Motion to Dismiss

¹⁶ *Calloway* is clearly on point authority that was binding upon the trial court and persuasive on appeal. Neither Dumas nor the Appellate Panel have cited authority directly in conflict with the decision. See *McDonald's Corp. v. Fla. Dept. of Transp.*, 535 So. 2d 323 (Fla 2d DCA 1988).

the Appeal dated November 25, 2008,¹⁷ Appellee Dumas urged the Appellate Panel to distinguish *Calloway* based upon the City's reference to the quasi-criminal nature of municipal violations in a single discovery response (R. 767-69).¹⁸ Ultimately, however, the Appellate Panel discarded *Calloway* as "not particularly instructive," due to "the perfunctory analysis recounted in the opinion."¹⁹

In dismissing *Calloway*, the Appellate Panel ignored Fla. R. App. P. 9.140 (c) on which *Calloway* is based. Rule 9.140 (c)(3) sets forth the *exclusive* bases for appeal of a criminal order.²⁰ Rule 9.140 (c)(3) does not confer jurisdiction to appeal an order which merely declares a municipal ordinance unconstitutional. *Calloway*'s analysis on this point is succinct because the Rule 9.140 (c) is clear and requires no elaboration.²¹ Brief or not, the holding of *Calloway* is correct and

¹⁷ See Appendix "2."

¹⁸ A copy of the Discovery Response and the applicable case authority cited therein, *City of Miami v. Gilbert*, 102 So. 2d. 818 (Fla. 3d DCA 1958), are attached hereto as Composite Appendix "13". Even the *Gilbert* case recognized that municipal violation proceedings "do partake of the nature of criminal rather than Civil proceedings." *Id.* Any attempt to discount the importance of *Calloway* on this ground is unwarranted.

¹⁹ See Appendix 1, at page 2.

²⁰ A copy of Rule 9.140 (c) is attached hereto as Appendix "14".

²¹ "The Florida Supreme Court has explained that 'the State's right to appeal an adverse ruling is a limited one that is strictly governed by statute, rule and overriding constitutional principles.'" *State v. Knight*, 931 So. 2d 254, 255 (Fla. 2d DCA 2006)(citations omitted). See also, *State v. Roberts*, 686 So. 2d 722 (Fla. 2d DCA 1997)(state had no right to appeal order requiring disclosure of confidential informant because it was not an appeal authorized under Rule 9.140(c)); *State v. Lewek*, 656 So. 2d 268 (Fla. 4th DCA 1995)(order severing charges is not an appealable order under Rue 9.140 (c)).

compelled the conclusion that the October Order was not the final, appealable order in the cause.

B. The Appellate Panel Ignored the Absence of Unequivocal Words of Finality in the October Order.

In dismissing the appeal, the Appellate Panel further overlooked the need for unequivocal words of finality, which were lacking in the October Order. While no particular form to achieve finality is prescribed by the rules of procedure or the courts, a final order must leave no judicial labor undone.²²

²² See, Appendix 1 at p.2, citing *Rollins Fruit Co., Inc. v. L.S. Wilson, III*, 923 So. 2d 516 (Fla. 2d DCA 2005) and *McGurn v. Scott*, 596 So. 2d 1042 (Fla. 1992). While factually distinct from the present case, neither *Rollins* nor *McGurn* undermine the City's position that the October Order was not appealable and that its appeal of the Final Order was timely. In *Rollins*, the court held that an order granting a motion to dismiss is not, itself, a final, appealable order. It required an "additional step" for finality. 923 So. 2d at 520 (entry of final judgment in favor of defendant). Here, the "additional step" to achieve finality was entry of the Final Order dismissing the charge against Dumas. See also, *State v. Gaines*, 770 So. 2d 1221 (Fla. 2000) (finding that even though State had no further evidence to present after motion to suppress evidence was granted, it was not until the trial court dismissed the charges that the judicial labor came to an end).

McGurn, on the other hand, involved an order that was not final, but was rendered in a form with clear attributes of a final judgment. Rather than dismissing the appeal based on the questionable form of the order, the court opted to permit the appeal, recognizing the "procedural quandary" in which the appellant was placed. 596 So. 2d at 1045. Similar equities favor reinstatement of the City's appeal, since the October Order did nothing more than grant the Constitutional Challenge in part. Under *Calloway* and Rule 1.940(c), Fla. R. App. P., the orders was clearly non-appealable.

Florida law negates finding that the October Order was ripe for appeal, because appropriate finality was lacking. Not only does the order fail “to effectuate a termination of the cause as between the parties affected,” *Ross v. Phillips*, 913 So. 2d 771, 773 (Fla. 2d DCA 2005), it also lacks of “unequivocal language of finality clearly indicating the trial court’s intention to bring an end to the judicial labor below,” *Hoffman v. Hall*, 817 So. 2d 1057, 1058 (Fla. 1st DCA 2002). The only clear, decisive end to the cause was the entry of the Final Order.

As the Florida Supreme Court held in *Board of County Commissioners of Madison County v. Grice*, 438 So. 2d 392, 394 (Fla. 1983), while “[a]n order on a motion to dismiss may not be final, ... an order which actually dismisses the complaint is.” The venue order in *Grice*, ordinarily considered interlocutory, was determined to be a final, appealable order because the order in question “*actually dismissed* the complaint.” *Id.*(emphasis added).

Here, the October Order did not dismiss the charge against Dumas; only the Final Order did. Thus, under *Grice*, the October Order was not final and appealable. *See also, Better Government Ass’n of Sarasota County, Inc. v. State*, 802 So.2d 414 (Fla. 2d DCA 2001) (orders granting motions to dismiss and motions for summary judgment are non-final, non-appealable orders); *Williams v. Maddren*, 147 So. 2d 572 (Fla. 2d DCA 1962)(order granting motion of summary judgment was not final adjudication); *Dept. of Revenue v. Bander*, 702 So. 2d 1341, 1342 (Fla. 5th DCA 1997)(“orders which grant motions to dismiss but lack words of actual dismissal are not appealable because they are not final”); *Scott v. Waste Mgmt., Inc. of Florida*, 537 So. 2d 686 (Fla. 4th DCA 1989)(order granting motion to dismiss is not final; judicial labor remaining is entry of order dismissing

complaint). The distinction “is not merely one of semantics, but rather one of jurisdiction.” *Dept. of Revenue v. Bander*, 702 So. 2d 1341 (Fla. 5th DCA 1997).

Given that the test of finality was not met until entry of the Final Order, it is clear that the Appellant Panel erred in dismissing the City’s appeal. Accordingly, a writ of mandamus should be issued to ensure the appeal is reinstated and that long-standing principles favoring resolution on the merits are served.

V. Conclusion

The Appellate Dismissal Order was erroneous. Mandamus lies to compel the Appellate Panel to hear and decide the City’s appeal on its merits. It was only after the charge was dismissed by the Final Order that the City’s appellate rights were triggered, and under controlling legal authority, the City’s appeal was timely filed.

WHEREFORE, respectfully requests that the Court issue a writ of mandamus requiring the Appellate Panel to reinstate the City’s appeal, and that the Court grant such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was sent via Facsimile & U.S. Mail to **Donald P. Day, Esq.**, Berry, Day, McFee &

Martin, 2670 Airport Road South, Naples, FL 34112 this 2d day of February, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition was prepared using Times New Roman, 14-point font, as required by the Florida Rules of Appellate Procedure.


CARLA M. BARROW