FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-752

TIMOTHY HUMPHREY,

Appellant,

v.

ASHLEY HUMPHREY,

Appellee.

On appeal from the Circuit Court for Gadsden County.
Francis Allman, Judge.

May 8, 2020

BILBREY, J.

Appellant challenges the final judgment of dissolution of marriage entered by the circuit judge upon the report and recommendation of the general magistrate. Appellant contends that after he filed a timely objection to the general magistrate hearing the case all proceedings thereafter needed to be held before a circuit judge. We agree with Appellant and reverse and remand for further proceedings.

The parties were married in 2003, but quickly committed a murder for which they remain incarcerated. In 2016, after years of incarceration, Appellee filed a petition for dissolution of marriage. A default was entered against Appellant but set aside. Appellant then filed a motion for temporary injunction to impose a

gag order on Appellee in an attempt to prevent her from talking about the murder.[1]

The circuit judge thereafter entered an order of referral to the general magistrate on August 7, 2017. The Appellant objected to the referral and provided his objection to the Department of Corrections for mailing on August 12, 2017.[2] The objection was not filed with the Gadsden County Clerk of Court until August 28th, and but for the fact that Appellant was a prisoner, the objection would have been untimely. *See* Fla. Fam. L. R. P. 12.490(b)(1)(A) (requiring an objection to a referral to a general magistrate to be filed within ten days). However, since Appellant was a prisoner, the "mailbox rule" applies. *See Griffin v. Sistuenck*, 816 So. 2d 600 (Fla. 2002). By providing the objection to the Department of Corrections for subsequent filing with the Gadsden County Clerk, the mailbox rule means that the objection was presumed to have been filed at that time. *See Ross v. Ross*, 93 So. 3d 495 (Fla. 2d DCA 2012) (holding that the mailbox rule applies to criminal and civil cases including family law cases). Since Appellant's objection to the referral to the magistrate was timely, the magistrate should not have presided over the case.

At the pre-trial hearing on November 9, 2017, the parties appeared by telephone before the magistrate and agreed to

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[1] Appellant apparently thought that if Appellee spoke about the murder to the press, it would hamper his ability to obtain postconviction relief. Throughout the dissolution action, Appellant has sought to improperly interject matters related to the murder conviction.

[2] Contrary to the dissent's contention, the objection was not just to the magistrate presiding over Appellant's requested injunction. The objection was styled "Respondent's Objections to Appointment of Magistrate." It referenced the pending dissolution of marriage. It cited rule 12.490, Florida Family Law Rules of Procedure. And the objection was clear that it was to the appointment of the magistrate for all matters related to the dissolution including "settlement of the dissolution," discovery, and the requested injunction.

dissolve the marriage. On December 7, 2017, the parties again appeared by telephone before the magistrate for the final hearing. The magistrate's report and recommendation from the final hearing noted Appellant's objection to the referral to the magistrate but recommended the circuit judge find that by appearing at the November 9th hearing and agreeing to a dissolution, Appellant waived his objection to the magistrate. The magistrate's report and recommendation also recommended that the circuit judge deny Appellant's requested injunction and gag order since the magistrate was not permitted to hear the request per rule 12.490(c), Florida Family Law Rules of Procedure.

Appellant filed a timely objection to the magistrate's report and recommendation. *See* Fla. Fam. L. R. P. 12.490(f). But the circuit judge approved the report and recommendation and entered a final judgment without hearing the Appellant's objection.

Because a referral to a general magistrate is based on "consent" whether express or implied, once Appellant filed a timely objection, the general magistrate had no authority to continue with the case. *See* Fla. Fam. L. R. P. 12.490(b)(1). To hold otherwise would allow a general magistrate to ignore an objection, hold a hearing nonetheless, and try to get a litigant to change his or her mind. In *Bathhurst v. Turner*, 533 So. 2d 939, 941 n.2 (Fla. 3d DCA 1988), the court remarked on the "potentially coercive effect" of having a hearing after an objection that may result in "forced acquiescence" to proceeding before a magistrate despite the earlier objection.

This case is very similar to the recent case *Skelly v. Skelly*, 257 So. 3d 150 (Fla. 5th DCA 2018). There, the father objected to the referral to the general magistrate, but the magistrate conducted a hearing anyway. The Fifth District held that was error. *Id.* at 151. "[W]here a party's proper objection to the referral to a magistrate is ignored," the order must be reversed. *Id.* As in *Skelly*, the former husband here renewed his objection to the general magistrate hearing the case after the magistrate's report and recommendations issued.

Our case *Christ v. Christ*, 939 So. 2d 256 (Fla. 1st DCA 2006), is also instructive. There, writing for the court, Judge Wolf said, "The rule is clearly stated. Where a party withholds consent and files a timely objection to the referral to a magistrate, that party is entitled to further proceedings in the circuit court." *Id.* at 257. *Christ* was cited with approval in *Garcia v. Garcia*, 958 So. 2d 947, 950 (Fla. 3d DCA 2007), which held once a proper objection to a magistrate is made, the objecting party "was entitled to have the matter heard before a circuit court judge."

When a party properly objects to a referral to a general magistrate with a timely filing under rule 12.490, the magistrate has no more authority to proceed, and the magistrate cannot have a hearing to see if the objecting party wishes to reconsider. Once the objection is filed, the implied consent to proceeding before a magistrate has ended, and therefore, there is no ability under rule 12.490 for the magistrate to act any further. Unlike an Article V judge, a magistrate has no inherent authority but has only the authority permitted by rule. "The judicial power" granted to judges under the Florida constitution is "not delegable and cannot be abdicated in whole or in part by the courts." *In re Alkire's Estate*, 198 So. 475, 482 (Fla. 1940).

General magistrates provide important assistance with the timely disposition of all or part of many types of cases, including family law matters. Florida does not have enough Article V judges to keep up with all the work of the judicial system.[3] The family law courts of Florida are fortunate to be able to rely on the assistance of general magistrates, hearing officers, and special magistrates. *See* Fla. Fam. L. R. P. 12.490, 12.491, & 12.492. But, for all their good work, including the ability to frequently hold hearings more quickly than circuit judges, magistrates are not

[3] For example, in Duval County, the most populous county in the First District, there are currently seven magistrates and four child support hearing officers. *See* https://www.jud4.org/Top-Navigation/Court-Administration/Magistrates-and-Hearing-Officers (last visited April 23, 2020). Without their work, the Fourth Judicial Circuit would likely need eleven new circuit judges just for Duval County.

Article V judges and can only constitutionally be referred an entire case with the consent of the parties. *See Slatcoff v. Dezen*, 74 So. 2d 59 (Fla. 1954). Rule 12.490(b) goes beyond the constitutional requirement and recognizes that a general magistrate may hear any family law matter (in whole or in part) only upon consent of the parties. Here, once Appellant withheld his consent to the referral to the magistrate, the magistrate was unable to act, and the case should have remained with the circuit judge.

The equities are certainly not in favor of the Appellant, and his attempt to secure an injunction may be frivolous.[4] But even a prisoner is entitled to access to courts. *See Mitchell v. Moore*, 786 So. 2d 521 (Fla. 2001). Furthermore, the Florida Family Law Rules of Procedure, including rule 12.490, apply to all litigants without mentioning the merits of a particular claim. *See* Fla. Fam. L. R. P. 12.010(a)(1). Therefore, since the circuit court approved the magistrate acting in absence of the limited authority granted under the Florida Family Law Rules of Procedure, we reverse for further proceedings before a circuit judge. As such, it is unnecessary to address the other issues raised by Appellant.

REVERSED and REMANDED.

ROBERTS, J. concurs; KELSEY, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

KELSEY, J., dissenting.

I dissent from the majority disposition for two reasons. First, the majority overlooks settled law holding that it is possible to

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[4] The circuit court has various means to sanction bad faith or frivolous litigation, especially involving a prisoner. *See, e.g.,* §§ 57.105 & 944.279, Fla. Stat. (2019).

waive objection to a magistrate referral; and then overlooks facts establishing that Appellant, former husband, waived any objection to the magistrate's exercise of jurisdiction over the dissolution issues. Second, I dissent from remanding for de novo proceedings on the parties' dissolution, because former husband consistently agreed to the dissolution of the marriage from his answer onward, and agreed to allow the magistrate to dissolve it. The only relief he seeks on appeal is to find a way to have the circuit court rule on his post-answer, independent motions for temporary injunction and gag order against Appellee, former wife—which former husband mistakenly believes requires even the dissolution to be vacated and remanded back to circuit court. To the contrary, the magistrate lacked jurisdiction over those motions, and the referral therefore could not have encompassed them. Reversal and remand for further proceedings on the dissolution is not necessary to allow former husband to pursue relief on his motions for injunction and gag order. He can assert those in circuit court. There is therefore no legal error for us to correct, and we should affirm.

I. Facts of the Underlying Dissolution.

These parties were married on July 4, 2003. The next day, they committed crimes resulting in the death of former husband's former girlfriend, and later resulting in these parties' being convicted and sentenced to life (former husband) and twenty-five years (former wife) in prison. After thirteen years of incarceration, former wife petitioned to dissolve the marriage. In former husband's answer to the petition, he agreed that dissolution should be granted, but asserted that financial and property issues needed to be resolved. Four months after filing his answer, former husband filed a motion for temporary injunction and a gag order to stop former wife from speaking publicly about the murder, because of potential impact on his post-conviction proceedings and because he feared that former wife would harm him or his family upon her release.

Shortly after the filing of former husband's motion for injunction and gag order, the magistrate judge issued a pretrial order governing proceedings before him. The circuit judge's order referring the matter to the magistrate did not issue until a week after the pretrial order. Former husband filed an objection to the

referral to the magistrate, which was timely under the mailbox rule for incarcerated litigants. Former husband's objection was solely that he had discovery requests still outstanding and not yet due, and that therefore referring the case to a magistrate deprived him of due process in securing discovery.

Both parties participated telephonically in the pretrial hearing before the magistrate. The magistrate's Report from this first hearing reflected that the parties had agreed to divorce, and to continue the hearing so the magistrate could research issues raised by former husband's motions for an injunction and gag order:

> [Both parties] agreed to divorce today at this pre-trial hearing and for the court to continue the remaining issues for the final hearing . . . .
>
> . . . .
>
> The Husband and Wife both filed pleadings in this case and personally appeared (by telephone) at this final [sic] hearing and agreed to divorce today.

The Report from the pretrial hearing does not document any objection to the magistrate's presiding over the dissolution issues. Former husband has not provided a transcript of the pretrial hearing.

Both parties again appeared before the magistrate telephonically for the final hearing. Although former husband has also failed to provide a transcript of this hearing, the record reflects that after the hearing occurred and before the magistrate issued a written report, former husband filed what he titled an "Appeal of Magistrate's Moot Decisions," in which he argued that the magistrate erroneously concluded at the hearing that former husband had waived his earlier objection to the referral. Former husband argued that his voluntary participation in the first hearing (in which both parties agreed to divorce, and which former husband does not dispute), did not constitute a waiver, reasoning that if a magistrate lacks jurisdiction over part of the issues, all of the issues must be heard in circuit court. Former husband also conceded that the magistrate lacked jurisdiction over part of the

issues (injunction and gag order), and argued that the partial lack of jurisdiction meant the circuit court had to retain jurisdiction over all issues in the case. The magistrate's final Recommended Report was filed several days later, and addressed the arguments former husband raised in his "Appeal of Magistrate's Moot Decisions."

In the final Recommended Report, the magistrate noted that former husband filed a new objection to the magistrate's involvement (the "Appeal" document) only after receiving at the hearing an oral adverse ruling as to the magistrate's lack of jurisdiction over the temporary injunction and gag-order issues. The magistrate's Report expressly found that former husband agreed to the exercise of jurisdiction over the dissolution, as follows:

> [B]ased upon the agreement of the parties/Former-Husband for the Magistrate to divorce the parties on the record on November 9, 2017, and discussion on the record that the Magistrate would review the pending issues for ruling at the final hearing today [December 7, 2017] on the remaining issue, the Court would find (and noted on the record today) that this would have constituted a waiver by the Former-Husband to having the Magistrate conclude the final hearing.

The magistrate also ruled that he did not have jurisdiction over a temporary injunction under Rule 12.490(c), which former husband would have to pursue in circuit court; and did not have jurisdiction to enter a gag order, which likewise would be a circuit-civil matter unrelated to the dissolution of marriage.

Former husband's arguments on appeal mirror those he made below. He argues that his early objection divested the magistrate of jurisdiction regardless of any subsequent acts he himself took before the magistrate, and that in any event the magistrate erroneously found that former husband voluntarily participated in the dissolution hearings. He argues that because, as he understands it, the magistrate lacked jurisdiction over the injunction and gag-order issues, the entire case including the agreed dissolution must go back to circuit court for disposition by a circuit judge.

II. Waiver.

The record reflects, without dispute, that both parties appeared telephonically at both hearings before the magistrate. The magistrate expressly found in both the initial Report and Recommendation and the subsequent Recommended Report that former husband had acceded to the magistrate's exercise of jurisdiction as to the dissolution issues. These factual findings must be deemed accurate, because former husband has not provided a transcript of either hearing to demonstrate that the findings were inaccurate. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (requiring reviewing court to affirm where record is insufficient to demonstrate reversible error). These facts demonstrate consent to the jurisdiction that the magistrate exercised.

The majority errs in purporting to hold that an objection to a magistrate referral cannot subsequently be waived. The law is to the contrary. *See Hand v. Kushmer*, 695 So. 2d 858, 859 (Fla. 2d DCA 1997) (explaining failure to timely object to magistrate's appointment constituted waiver); *Goldfarb v. Agran*, 546 So. 2d 24, 25 n.1 (Fla. 3d DCA 1989) (recognizing a litigant can waive objection by "voluntarily participating in the hearing before the general master"); *Bathurst v. Turner*, 533 So. 2d 939, 941 n.3 (Fla. 3d DCA 1988) (noting that fact-specific holding of non-waiver "should not be read as implying that a party may not waive the right to object to even an invalid referral by voluntarily participating in the proceeding before the master"); *see also* Fla. Fam. L. R. P. 12.490(b)(1) (providing that consent "may be implied"). The facts presented here demonstrate a timely objection, followed by a waiver resulting from former husband's conduct— participating in two hearings without further objection.

The majority's reasoning—that a finding of waiver from post-objection acquiescence would improperly allow a magistrate to try to coerce parties into going along with the magistrate's exercise of jurisdiction—is directly contrary to the cases recognizing that voluntary participation constitutes a waiver. Further, contrary to the majority's suggestion of potential manipulation by a magistrate, this record reflects that the magistrate here did quite the opposite. He confirmed the parties' willingness for him to

resolve the dissolution, he refrained from exercising jurisdiction over the injunction and gag-order issues, carefully researched his jurisdiction over those issues, and then declined to exercise jurisdiction over those issues. Nothing improper or reversible occurred here.

The majority relies on cases that are factually inapposite. The cited cases give effect to a party's timely and proper objection when a case is referred to a magistrate, but those cases did not involve the facts before us: a limited objection (solely on grounds of needing to complete discovery), followed by a party's actively participating in a hearing before the magistrate and explicitly agreeing to the hearing, followed by objections below and on appeal on the grounds that the injunction and gag order needed to be addressed in a proper forum. Former husband's participation in the two hearings before the magistrate, reinforced by the magistrate's express finding that former husband affirmatively *agreed* to the magistrate's exercise of jurisdiction over the dissolution issues, establishes a waiver. Any other holding invites gamesmanship, where a litigant can object to a magistrate referral; and then if for whatever reason the case goes to the magistrate anyway, participate in the proceeding, see how it comes out, and belatedly challenge an unwanted outcome—exactly what former husband did here and one of the reasons the magistrate expressed for rejecting former husband's belated argument. Rather than approve such gamesmanship, we should affirm.

III. Remand Is Improper.

I also dissent from the majority's disposition because it exceeds the scope of relief former husband actually seeks and to which former husband is entitled. Former husband initially objected to the magistrate referral because he had discovery related to the dissolution outstanding, but then he participated in the hearing during which the parties agreed to the dissolution. Former husband's subsequent filings reflected his belief that if the magistrate could not exercise jurisdiction over the injunction and gag-order issues, then it was necessary to send the entire case, including the dissolution, back to the circuit court for resolution. He presumes the same on appeal. He was and is wrong about that;

we can and should affirm the dissolution on these facts, and former husband is free to pursue collateral motions in circuit court.

As the majority acknowledges, rule 12.490(b) allows magistrates to hear family law cases in part as well as in whole; and that is what occurred here. The magistrate presided over the dissolution issues but not the injunction, which he expressly noted was outside his jurisdiction under rule 12.490(c); or the gag-order claims, which had to be resolved in circuit-civil court and were not for a family-law court to address. The magistrate clearly had jurisdiction over the dissolution, and the magistrate's reports, adopted by the circuit court, found as a matter of fact that both parties agreed to the exercise of jurisdiction over the dissolution. Former husband has failed to demonstrate any error in those findings of fact. It is erroneous as a matter of law to hold that the undisputed dissolution must be vacated and remanded for a do-over in circuit court because of collateral claims beyond the magistrate's jurisdiction. The dissolution stands apart as proper, final, and unaffected by former husband's collateral motions. We should affirm.

Timothy Humphrey, pro se, Appellant.

No appearance for Appellee.