NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Appellant/ Cross-Appellee, v. ANDREW MIYASATO, Appellee/ Cross-Appellant.	)	Case No. 2D00-936

Opinion filed October 26, 2001.

Appeal from the Circuit Court for Polk County; Dennis P. Maloney, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Patricia E. Davenport, Assistant Attorney General, Tampa, for Appellant/Cross-Appellee.

James Marion Moorman, Public Defender, and William L. Sharwell, Assistant Public Defender, Bartow, for Appellee/Cross-Appellant.

ORDER ON MOTION TO STAY OR WITHDRAW MANDATE

ALTENBERND, Acting Chief Judge.

The State has filed a motion asking this court to stay the issuance of the mandate in this case while the State seeks further review in the Supreme Court of Florida. Although the State filed its motion to stay mandate more than fifteen days after this court denied the State's motion for rehearing, we grant the motion. We hold that the issuance of mandate in this case was not a ministerial act, and therefore this court has the discretion to withhold issuance of its mandate while the State seeks further review.

On March 7, 2001, this court issued an opinion in this case reversing the trial court's denial of a motion to suppress evidence. State v. Miyasato, 26 Fla. L. Weekly D698 (Fla. 2d DCA Mar. 7, 2001). In pertinent part, this court held that the State had not established that Mr. Miyasato's mother had actual or apparent authority to consent to the search of her adult son's personal desk in his bedroom in her home, particularly when the adult son was present and available to give his consent. On May 21, 2001, this court denied the State's motion for rehearing. This court had the authority to issue mandate on June 6, 2001, fifteen days after the denial of rehearing. See Fla. R. App. P. 9.340(b). We did not do so. No judge of this court internally ordered the clerk to stay mandate at any time prior to June 6, 2001.

On June 13, 2001, the State filed a motion to stay or recall our mandate in conjunction with its notice to invoke the supreme court's discretionary jurisdiction. The State asks this court to stay the issuance of the mandate because it is seeking review of

the opinion in the Supreme Court of Florida and further proceedings in the trial court might render any further review moot. It is noteworthy that our opinion addresses Fourth Amendment issues that could also be reviewed by the United States Supreme Court even if the Supreme Court of Florida declined to review the case. See 28 U.S.C. § 1257(a).

As of the date the State filed its motion to stay mandate, this court had not issued its mandate. The three-judge panel ordered the clerk to stay the issuance of mandate during the pendency of this motion and ordered Mr. Miyasato to respond to the motion. Mr. Miyasato responded, arguing that the issuance of the mandate on June 6, 2001, was a ministerial duty that this court was compelled to perform. See State ex rel. Price v. McCord, 380 So. 2d 1037 (Fla. 1980). We disagree. We hold that McCord applies only to those cases involving a final judgment for money damages that grants the prevailing party a vested right. In other cases not affecting such fixed, vested rights, the district court has discretion to withhold or withdraw its mandate while a party actively seeks further review.

STATE EX REL. PRICE V. MCCORD

McCord was a civil case involving a money judgment. At trial, the plaintiff obtained a money judgment for personal injuries. After the First District affirmed the plaintiff's judgment, the defendants sought further review but did not file a motion to stay mandate within the fifteen days between the court's decision to deny rehearing and the issuance of the mandate. Nevertheless, the First District set aside its mandate and denied the plaintiff's motion to issue a new mandate. The plaintiff filed a petition for writ of mandamus in the supreme court to compel the First District to issue its mandate. The

supreme court granted the writ, stating in part:

> In the present case, appellants did not move for a stay of mandate, nor did the court enter a stay on its own motion within the fifteen-day period. Under these circumstances, rule 9.340 makes the issuance of mandate a ministerial duty after the fifteen-day period has expired. That duty, of course, may properly be compelled by writ of mandamus.

380 So. 2d at 1038.

This court agrees that it has a ministerial duty to issue mandate on a money judgment upon expiration of the time frames described in rule 9.340. Although our internal practices have varied over the years, at the present time we take reasonable steps to issue mandate in such cases upon expiration of the fifteen-day period. On the other hand, this court has not complied with McCord in criminal cases or in some civil cases involving matters other than money judgments. For example, in criminal cases, we do not typically issue mandate until at least twenty-one days have elapsed because the mail box rule[1] affects many criminal cases. We write this opinion to explain that the Second District does not regard McCord as controlling precedent in cases other than civil cases involving final money judgments.

PURPOSE AND PRACTICAL EFFECT OF MANDATE

In general, the mandate in any case functions to end the jurisdiction of the appellate court and to return full jurisdiction of the case to the trial court. If a stay has been entered under Florida Rule of Appellate Procedure 9.310, the mandate typically causes the stay to end. See rule 9.310(e). The specific function and effect of a mandate differs

[1] See Haag v. State, 591 So. 2d 614 (Fla. 1992).

significantly, however, depending upon whether the case is a civil case or a criminal case, and whether the appeal is one of a final order or of a nonfinal order.

When a defendant in a civil case appeals a final monetary judgment and posts a bond, the defendant must wait to collect the judgment until mandate issues. If we affirm such a judgment, there is little reason to delay the plaintiff's right to collect the judgment by withholding the mandate. When a plaintiff appeals a defense judgment, the situation is similar except that the only judgment to be collected on remand is often a cost judgment in favor of the defendant. In these cases, the party has a strong, vested right awaiting the mandate for enforcement. In other cases, however, the practical function and effect of the mandate requires that the district court have more discretion and flexibility regarding the issuance of the mandate.

For example, when either party in a civil case appeals a nonfinal order, that party has no vested right to collect or enforce a judgment. The trial court proceeding is not automatically stayed, and the parties can continue, with some exceptions, to litigate in the trial court. Our mandate in such a case merely returns full jurisdiction to the trial court. In such a case, this court should have discretion to stay or delay issuance of a mandate.

In criminal cases, other considerations apply. When the defendant appeals a judgment and sentence, the need for timely issuance of a mandate depends upon the specific facts of the case. If the defendant's sentence has commenced and we affirm the judgment and sentence, the issuance of our mandate has no practical effect. In the rare case where the defendant's sentence has been stayed pending appeal and this court affirms the sentence, the State may have an interest in obtaining a mandate at the earliest

available time in order for the defendant's sentence to commence. If we reverse the judgment and sentence, the case returns to the trial court for further proceedings consistent with the opinion. If we order an acquittal and the defendant is currently in prison, the defendant has a greater interest in a rapid issuance of mandate because it is required to obtain release from prison, but the State may still have valid reasons to obtain a stay pending review in the supreme court. If the reversal results in a new trial, the defendant and State probably have less need for an immediate mandate.

Because of double jeopardy, the State cannot appeal final judgments in favor of defendants entered after a trial. Thus, the State generally appeals nonfinal orders or dismissals that occur prior to the attachment of jeopardy. See Fla. R. App. P. 9.140(c)(1). If we affirm an order of dismissal, our issuance of mandate has little practical effect. If we affirm a nonfinal order suppressing evidence, like we did in this case, on remand the case will either be dismissed or tried without the disputed evidence. A trial without disputed evidence could result in a jury verdict adverse to the State and a double jeopardy bar to further appeal.

The foregoing general discussion demonstrates that a final money judgment is the only common circumstance in which a party has a strong vested right that awaits the mandate for enforcement. In other cases, the status of the parties, the result of the opinion, and the effect that opinion will have on the parties require that the appellate court have greater discretion and flexibility in deciding when to issue its mandate.

We recognize that rule 9.340 can be read as creating a ministerial duty on the part of our clerk to issue mandate in all cases at the earliest possible moment absent a

case-specific order from the judges of this court directing the clerk to withhold the mandate. We note that, although motions to stay issuance of mandate are common, there is no rule of procedure authorizing this motion. It is most frequently used in cases in which no stay under rule 9.310 has been entered, but the appeal itself has effectively stayed proceedings below. If this court and its clerk have no discretion concerning the issuance of mandate, presumably we would need to receive and rule upon any motion to stay the issuance of a mandate prior to the expiration of the fifteen-day period in order to avoid the mandatory issuance of mandate. As a practical matter, it is unrealistic to place a burden upon this court to review each case prior to the issuance of a mandate and issue orders in the hours preceding the expiration of the fifteen-day period if it wishes to extend its jurisdiction over a handful of the more than 5000 cases it resolves in any given year.

In addition, such an interpretation seems inconsistent with other discretionary authority this court has over its mandates. Although this case involves the decision to stay issuance of mandate, appellate courts have the authority to withdraw their mandates and reassert jurisdiction to reconsider their opinions within a term of court. Judges of the Eleventh Judicial Circuit v. Janovitz, 635 So. 2d 19 (Fla. 1994); Chapman v. St. Stephens Protestant Episcopal Church, 138 So. 630 (Fla. 1932). Indeed, the district courts of appeal regularly do so. See, e.g., Golz v. State, 722 So. 2d 210 (Fla. 2d DCA 1998); Francilien v. State, 782 So. 2d 1008 (Fla. 4th DCA 2001); Jones v. State, 773 So. 2d 107 (Fla. 5th DCA 2000). The courts possess this power, even though there is no rule of procedure governing this process. It is difficult to believe that appellate courts would have a ministerial duty to issue all mandates on a specific date if they have discretion

immediately thereafter to withdraw the mandate.

FACTORS TO BE WEIGHED IN DETERMINING WHETHER TO STAY MANDATE

Because we conclude that we have discretion to determine whether to issue the mandate in this case while the State seeks further review of our opinion, we must address what factors should be reviewed in making such a decision. The McCord decision suggests that a district court can withhold mandate after considering several factors derived from the comments to Florida Rule of Appellate Procedure 9.120. These factors include (1) the likelihood that jurisdiction will be accepted by the supreme court, (2) the likelihood that the movant will prevail on the merits in the supreme court, (3) the likelihood of harm if the stay is not granted, and (4) the likelihood that the harm would be irreparable in the absence of the stay. The Fourth District recently applied these factors in a published order denying a stay of the mandate. Oliveira v. State, 765 So. 2d 90 (Fla. 4th DCA 2000). We also conclude that because we could consider similar factors to withdraw our mandate, we should also consider these factors in deciding whether to stay our unissued mandate in this criminal case.[2]

In this case, the likelihood that the supreme court will accept jurisdiction is difficult to gauge. Obviously, this panel of judges–having ruled against the State–is not in

[2] The burden of persuasion in this context must be placed on the movant. Many motions to stay issuance of a mandate recite these grounds without any factual elaboration. Often this court has insufficient information available to it to determine whether irreparable harm could result in the absence of a stay. The State frequently asserts a double jeopardy risk when the basis for that claim is unclear or doubtful. This court often denies motions when the State fails to present sufficient information to support its assertions.

the most objective posture to measure this factor. Although the State's motion is not overly persuasive on this issue, it points out that there are numerous Fourth Amendment cases in this state and a conflict may exist between this decision and one of those decisions.

Assuming the supreme court grants jurisdiction, we accept the proposition that the State has arguments that it can present in good faith. As our opinion reflects, there is precedent from other jurisdictions that would support the State's position.[3] However, the likelihood of the State's success in the supreme court is unclear.

The harm to Mr. Miyasato arising from a stay appears minimal. Mr. Miyasato is not incarcerated. He has not invoked his right to speedy trial. He has not claimed that a stay would cause any special harm to him. The order appealed is a pretrial order. At worst, a stay allows a criminal proceeding to remain pending and unresolved for a few months. A stay may prevent Mr. Miyasato from attempting to take steps to invoke double jeopardy and, thus, protect our favorable decision from review by a higher court. Thus, if anything, there is a risk that the denial of the stay might cause irreparable damage to the State.

Balancing these factors together, although we believe the State's chances of victory are small, the harm to Mr. Miyasato caused by a stay is minimal and the risks to the State if no stay is granted are significant. We would be hard pressed to rule that a stay is "essential" in this case, if that is truly the test. See Fla. R. App. P. 9.120 committee notes. We are not convinced that the balance must weigh so heavily in

---

[3] We frankly are uncertain what, if any, consideration we should give to the possibility that the United States Supreme Court could review this case even if the Supreme Court of Florida declined review.

favor of the State in this type of appellate proceeding. Given the absence of any real harm to Mr. Miyasato, we grant the stay.

NORTHCUTT and CASANUEVA, JJ., Concur.