

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: CJAP 07-50
LOWER COURT CASE NO: 2007-CT-635

STATE OF FLORIDA,

Appellant,

vs.

ANDREW JOSEPH STRONCZER,

Appellee.

Appeal from the County Court for Orange County,
Florida, Wayne J. Shoemaker, County Court Judge

Lawson Lamar, State Attorney and Abigail Forrester Jorandby,
Assistant State Attorney, for Appellant

Stuart I. Hyman, Esq.,
for Appellee

Before THORPE, SHEA, and TURNER, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Andrew Stronczer (“Appellee”) was charged with Driving Under the Influence, in violation of section 316.193(1), Florida Statutes (2007). Appellee filed a motion for discharge under Florida Rule of Criminal Procedure 3.191, which the trial court granted. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). The State timely filed this appeal on the final order granting Appellee’s Motion for Discharge, rendered on July 19, 2007.

On February 11, 2007, Appellee was arrested for Driving Under the Influence in violation of section 316.193(1), Florida Statutes. On April 19, 2007, the case was called for

trial but Appellee's counsel was not present because he was in another trial. The trial court determined that the defense was unavailable for trial and speedy trial was waived. On April 24, 2007, the State entered a nolle prosequi. On May 1, 2007, the State refiled the Information. Appellee filed a motion for discharge on June 26, 2007, alleging that he had not been brought to trial although he was continuously available for trial during the 90 day time period. On July 19, 2007, a hearing was held and the trial court granted Appellee's Motion for Discharge.

“An order of a county court comes to the circuit court with a presumption of correctness, and the circuit court must interpret the evidence in a manner most favorable to sustaining the trial judge's ruling.” *State v. Kirby*, 752 So. 2d 36, 37 (Fla. 5th DCA 2000). A trial court's ruling on a motion for discharge could be a mixed question of law and fact. The factual findings must be sustained if supported by competent substantial evidence. *See Young v. State*, 803 So. 2d 880, 882 (Fla. 5th DCA 2002). The trial court's application of the law to the facts is subject to de novo review. *See Id.*

The State argues that the court erred in granting Appellee's Motion for Discharge. The State asserts that the record on appeal shows that on the day of trial, Appellee's defense counsel was not available and therefore, Appellee was not entitled to be discharged. The State further claims that even if Appellee was continuously available for trial, the State was entitled to the recapture period.

Appellee argues that the State's argument that speedy trial was waived was not raised below and therefore, cannot be considered by this Court. In addition, Appellee contends that the State was not entitled to a recapture period because he was neither rearrested nor

notified of the charges after the State filed a nolle prosequi until after the speedy trial period expired.

Florida Rule of Criminal Procedure 3.191(p)(1) states that no remedy shall be granted to any defendant under this rule until the court has made the required inquiry under subdivision (j). Pursuant to 3.191(j)(3), a pending motion for discharge shall be granted by the court unless it is shown that the accused was unavailable for trial under subdivision (k). A person is unavailable for trial and not entitled to be discharged under 3.191(k) if the person or the person's counsel fails to attend a proceeding at which either's presence is required. *Bouchacra v. Leffler*, 413 So. 2d 791 (Fla. 5th DCA 1982); *State v. Phillips*, 520 So. 2d 609 (Fla. 3d DCA 1987); *Belcher v. State*, 372 So. 2d 546 (Fla. 3d DCA 1979)(*citations omitted*).

The trial court determined that the defense waived speedy trial on April 19, 2007 when counsel was not present for trial. Although the State failed to raise this point during the hearing on the motion for discharge, proof that the defense was unavailable for trial can be found by the trial court if a defendant or counsel fails to attend a required proceeding. *Dixon v. State*, 901 So. 2d 384, 386 (Fla. 3d DCA 2005). The fact that counsel was in another court room trying another case on the day the case was called for trial is competent substantial evidence that the defense was unavailable for trial. *Belcher*, 372 So. 2d 546.

The trial court's factual finding that the defense was unavailable for trial and waived speedy trial precluded it from granting Appellee's Motion for Discharge. Fla. R. Crim. P. 3.191(k). There is no need to address whether the State was entitled to the recapture period because the trial court determined Appellee waived his right to speedy trial.

The trial court erred by granting Appellee's Motion for Discharge and the Order must be reversed.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's Order granting Appellee's Motion for Discharge is **REVERSED** and the case is **REMANDED** for further proceedings.

DONE AND ORDERED on this __18__ day of __November____ 2008.

_____/S/_____
JANET C. THORPE
Circuit Court Judge

_____/S/_____
TIM SHEA
Circuit Court Judge

_____/S/_____
THOMAS W. TURNER
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order Reversing Trial Court has been provided to **Stuart I. Hyman, Esq., Stuart I. Hyman, P.A.**, 1520 East Amelia Street, Orlando, Florida 32803; and **Abigail Forrester Jorandby, Assistant State Attorney**, P. O. Box 1673, Orlando, Florida 32802 this __18__ day of __November____ 2008.

_____/S/_____
Judicial Assistant