

"THE 'WRITE' WAY TO AVOID REVERSALS"  
BY JUDGE MARK KING LEBAN  
DADE COUNTY COURT JUDGE

I. INTRODUCTION

A. OBJECTIVES

1. To provide guidance to County Court Judges in drafting orders that will withstand appellate review.
2. To provide guidance in developing a judicial philosophy for making findings and deciding issues.

II. PATHS OF REVIEW

A. Direct appeal to Circuit Court acting in its appellate capacity (Rule 9.030(c)(1)(A)&(B), Fla.R.App.P.)

B. By-passing Circuit Court review.

1. Pass-through certification to District Court of Appeal (Rule 9.030(b)(4)(A)&(B); Rule 9.160, Fla.R.App.P.; Section 34.017, Florida Statutes.)
  - a. Both Rule 9.160, Fla.R.App.P., and section 34.017, Florida Statutes, provide that county court judges may certify questions of great public importance directly to the District Court of Appeal for review of orders that would ordinarily be appealed to

the Circuit Court acting in its appellate capacity. The rule and the statute make it clear that the District Court of Appeal's decision to exercise this direct review of County Court orders is strictly discretionary. However, where the County Court has entered an order with a certified question, the Rules of Appellate Procedure provide that the party filing any appeal from such an order must commence the appeal in the appropriate District Court of Appeal. See Rule 9.160(b), Fla.R.App.P.

- b. The Rule also sets forth the method of certification. See 9.160(d), Fla.R.App.P. The judge may, sua sponte, determine to certify the question in the order, or, either party may file a timely motion for rehearing or clarification where provided for by the rules requesting the judge to certify a question for review directly to the District Court of Appeal. Any such order certifying a question of great public importance must contain (1) findings of fact and conclusions of law and (2) "a concise statement of the issue or issues of great public importance." Rule 9.160(d), Fla.R.App.P. Appended to this outline is a recent Order Granting Suppression of Defendant's Statement and Certification of Question of Great Public Importance.
- c. A recent Second District decision discussed the certification statute and rule of appellate procedure in

Florida Statutes.

- a. Where the County Court has declared a state statute unconstitutional, review must occur in the appropriate District Court of Appeal since “[c]ircuit courts lack jurisdiction to hear appeals from county court decisions declaring statutes invalid.” Fieselman v. State, 566 So.2d 768, 770 n.1 (Fla. 1990). Indeed, “[o]nly the district courts can hear such appeals from county courts.” Id. at 770. See also State v. Conforti, 22 Fla.L.Weekly D144 (Fla. 4th DCA Jan. 8, 1997)(direct review in DCA from County Court order declaring criminal statute unconstitutional under state and federal constitutions).
- C. Common law certiorari to the District Court of Appeal from the Circuit Court acting in its appellate capacity (Rule 9.030(b)(2)(B), Fla.R.App.P.)
  1. County Court order denying dismissal is not reviewable by common law certiorari to the District Court of Appeal or the Circuit Court acting in its appellate capacity. Fieselman v. State, 566 So.2d 768, 770 (Fla. 1990). This is so since the losing party can seek eventual review through plenary appeal to the Circuit Court acting in its appellate capacity. Id.
- D. Certiorari to the Supreme Court from the District Court of Appeal (Rule 9.030(a)(2), Fla.R.App.P.)

III.STANDARDS OF REVIEW

A. Direct appeal

1. Presumption of Correctness. "[A]n order of the county court... comes to the circuit court with a presumption of correctness and the circuit court must interpret the evidence, and reasonable inferences and deductions therefrom, in a manner most favorable to sustaining the trial court's ruling." Maurer v. State, 668 So.2d 1077, 1078 (Fla. 5th DCA 1996).
2. Right Result - Wrong Reason. "Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it." Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979).
3. Immutable Rules, Part I. The presumption of correctness, noted above by the Maurer court has its roots in common sense and practical considerations. "The county court is the sole arbiter of the credibility and weight of the evidence...; that is the exclusive province of the county court judge." Maurer supra. Appellate courts generally do not substitute their opinion as to such issues as credibility for the opinion of the County Court judge. "A ruling on a motion is presumed to be correct and our duty as an appellate panel is to interpret the evidence and reasonable inferences therefrom in a manner most favorable to sustaining that determination." State v. Franko, 681 So.2d 834, 835 (Fla. 1st DCA 1996). The fact that "we might have ruled

differently had we been sitting as the trier of fact" will not compel reversal since "we cannot substitute our judgment for the able trial court on the question of witness credibility." Id. The most often cited rationale for permitting the trial judge to determine fact questions is the recognition that the "cold record" cannot reflect such things as a witness's demeanor in the courtroom. Thus, it has been said that "it is virtually impossible for any judge other than the actual trial judge to properly entertain a challenge to a jury verdict based upon the weight [of the evidence] where... the credibility of the witnesses played such an important role.\*\*\* [A] careful consideration of the credibility of the witnesses cannot be adequately accomplished by a mere reading of the cold trial transcript." Sanford v. State, 22 Fla.L.Weekly D307, D308 (Fla. 3rd DCA Jan. 29, 1997). Expounding on this important point, the Third District observed:

The demeanor, physical appearance, gestures, voice intonation, etc. of the witness while testifying are also critical factors which bear on the credibility of the witness. And such factors clearly cannot be captured or articulated on a trial transcript. Only the judge who actually presided over [the] trial and observed the witnesses will know what significance, if any, such factors played in the outcome of the trial. Id.

The determination of the credibility of

witnesses is exclusively the province of the trier of fact. This applies with respect to all witnesses, including police officers: "A judge acting as fact-finder is not required to believe the testimony of police officers in suppression hearings, even when that is the only evidence presented; just as a jury may disbelieve evidence presented by the state even if it is uncontradicted, so too the judge may disbelieve the only evidence offered in a suppression hearing." Maurer v. State, 668 So.2d 1077, 1079 (Fla. 5th DCA 1996).

4. Sample Findings of Fact to Withstand Appellate Review. Whether making fact findings by written order or on the record in transcribed proceedings, it is incumbent upon the trial judge to make specific findings of fact including detailed recitations of indicia of credibility. Examples of such fact findings that have withstood appellate review appear throughout the decisional law. Some notable samples have been included in the appendix to the outline. Thus, in Simmons v. State, 683 So.2d 1101, 1103 (Fla. 1st DCA 1996), the First District was impressed with the trial judge's specific fact findings when ruling on an issue of a witness's competence. Note the trial judge's recitation of specific facts in the witness's "historical development" as well as the judge's incorporation of the appropriate legal standard for determining competence as applied to the specific facts found by the judge. Another good example of fact findings that withstood appellate review

appears in Macias v. State, 21 Fla.L.Weekly D639 (Fla. 4th DCA March 13, 1996), where the trial judge in ruling on the admissibility of in-court identification testimony, in the face of a defense challenge based on suggestive identification procedures, found:

[The] victim appears to have an excellent and detailed memory of the events and the statements and the voice. She remembers extreme detail [;][it] is clear in her presentation of it, and positive in its contents. Let me be sure that the record reflects that I am deeply impressed with the manner in which [the victim] recited the events, recalled the events, and had detail with regard to the events in this case. I think that is very important in these factual findings. 21 Fla.L.Weekly at D639.

5. Immutable Rules, Part II.

- a. Notwithstanding that "credibility choices" are generally impervious to appellate review, we as fact finders must be aware of certain legal principles that guide us even in credibility assessments. Thus, while it has been said that a "judge acting as fact-finder is not required to believe the testimony of police officers in a suppression hearing, even when that is the only evidence presented," Maurer v. State, 668 So.2d 1077, 1079 (Fla. 5th DCA 1996), it has also been held that "[a] trial court cannot arbitrarily reject unrebutted

testimony." Republic National Bank of Miami v. Roca, 534 So.2d 736, 738 (Fla. 3rd DCA 1988). The reason for this apparent exception to the Maurer rule is that "[w]here the testimony adduced is not 'essentially illegal, contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, or inconsistent with other circumstances,'... it should not be disregarded but accepted as proof of the issue." Roca at 738 [citations omitted]. See also Dudley v. State, 511 So.2d 1052, 1057 (Fla. 3rd DCA 1997) ("a defendant's otherwise reasonable, unrebutted, and unimpeached testimony in a criminal case must be accepted by a trier of fact and -- if such testimony is entirely exonerating, the trial court is obligated to enter a judgment of acquittal for the defendant on the crime charged."). However, "[e]ven uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." Foster v. State, 679 So.2d 747, 755 (Fla. 1996).

5. Exception to the Immutable Rules. Notwithstanding the presumptively impervious fact finding prowess of trial judges, there exists a narrow category of cases where appellate courts will reverse findings of fact entered by a trial judge:

While findings of fact by a trial judge upon conflicting evidence

should ordinarily not be disturbed on appeal where there is ample evidence to sustain the finding, yet where the trial judge misapprehended the legal effect of the evidence as an entirety, and... if the finding is not "according to the law and justice of the case,"... as well as by the general principles of law, the finding of the trial judge should not be sustained merely because there is evidence that is contradicted on which the finding may be predicated. [Citations omitted].

Where the finding of a trial judge is contrary to the legal effect of the evidence on the issues made the appellate court should reverse the finding, even though the trial judge personally saw and heard the witnesses testify, and even though there were conflicts in the testimony, and there was some evidence tending to support the finding. Newman v. Smith, 77 Fla. 633, 82 So. 236, 241 (Fla. 1918). [Emphasis added].

Examples of the application of this "exception" to the usual presumption of correctness will be set forth during the lecture. See, especially, the materials in the appendix to this outline pertaining to the case of State v. Moses, 682 So.2d 595 (Fla. 3rd DCA 1996). Apparently, there are circumstances where an appellate court will not accept a trial judge's fact

findings and, in such cases, the appellate court will resort to the Newman rule that the findings of fact are "contrary to the legal effect of the evidence." See, e.g. Branam v. Aqua-Clear Pool, Inc., 672 So.2d 69 (Fla. 3rd DCA 1996); Miller v. First American Bank and Trust, 607 So.2d 483, 484 (Fla. 4th DCA 1992); Becklin v. Travelers Indemnity Company, 263 So.2d 629, 630 (Fla. 1st DCA 1972) (where the trial court has misconceived the legal effect of the facts, the appellate court is required to take cognizance thereof.").

B. Common law certiorari

1. Departure from the essential requirements of the law. Generally there is no certiorari review of County Court orders. The method by which common law certiorari arises in the appellate food chain is to review decisions of the Circuit Court acting in its appellate capacity of County Court orders. In such cases, after the Circuit Court issues its decision acting in its appellate capacity, the losing party may petition the applicable District Court of Appeal for a Petition for Writ of Common Law Certiorari. Rule 9.030(b)(2)(B), Fla.R.App.P. The standard of review in the District Court of Appeal of such Circuit Court decisions is most onerous:

In granting writs of common-law certiorari the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list

all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari. [Citation omitted]. A district court may refuse to grant a petition for common-law certiorari even though there may have been a departure from the essential requirements of law. Combs v. State, 436 So.2d 93, 95-6 (Fla. 1983). [Emphasis added].

It has been said that certiorari "is an extraordinary remedy and a petition should only be granted where there is a clear violation of an established principle of law resulting in a miscarriage of justice." Pruitt v. State, 682 So.2d 629, 630 (Fla. 3rd DCA 1986), (Gersten, J., dissenting). Even where the trial judge misapplied the correct law, such an error "is not a matter of disobedience to the law," sufficient to give rise to certiorari review. Stilson v. Allstate Insurance Company, 22 Fla.L.Weekly D1088, D1089 (Fla. 2nd DCA April 30, 1997). And, where there has been no violation of precedent, it can hardly be said that a

County Court judge has committed a "miscarriage of justice" so as to justify certiorari review. Stilson, supra. An example of a Circuit Court, sitting in its appellate capacity, departing from the essential requirements of law in reversing a County Court order appears in Maurer v. State, 668 So.2d 1077 (Fla. 5th DCA 1996). In Maurer, the County Court entered its order on a motion to suppress in which the judge made certain findings of fact. On direct appeal to the Circuit Court the appellate court reversed the County Court's suppression order. On petition for writ of common law certiorari to the Fifth District, that court quashed the Circuit Court's appellate reversal, finding that the "circuit court's order represented a departure from the essential requirements of law in that the circuit court did not apply the correct law." 668 So.2d at 1078. This was so since "the circuit court departed from the essential requirements of the law when it reweighed the evidence and substituted its judgment for that of the county court." Id.

#### IV. COMPOSING THE ORDER

##### A. Findings of fact and conclusions of law.

###### 1. Methods of making.

a. Listen

b. Take good notes.

c. Suggest or order the parties to submit proposed fact findings/conclusions of

law.

- d. Make detailed credibility determinations on the record or in written order.
- e. Know the law; order parties to submit briefs.
- f. Apply the facts as found to the law.
- g. Cite relevant and controlling decisional law, statutes, rules.

2. Oral Rulings.

- a. No court reporter/transcription. It is said that a party appealing a court's ruling has the burden to make error appear. Where there is no transcription of proceedings as is often the case in County Court, the party appealing nevertheless has the burden to create a record. Where the party taking an appeal has failed to provide either a transcript of the trial proceedings or a settlement agreement approved by the trial judge pursuant to Rule 9.200(b)(4), Fla.R.App.P., the appellate court will have "no alternative but to affirm the final judgment." Olsen v. Mason, 682 So.2d 1240 (Fla. 5th DCA 1996). For another example see Hudson Pest Control v. Westford Asset Mgt., 622 So.2d 546, 547 (Fla. 5th DCA 1993), where the Fifth District held: "In this case, there is no transcript of the testimony presented to the trial judge. We thus must give utmost

credence to his fact findings, and assume there was the best imaginable evidence adduced to support them." Thus, absent a record of the proceedings, either by way a transcription of proceedings or a reconstructed record (which must be approved by the trial judge), the burden on the appealing party to make error appear is insurmountable.

3. No order. Even where the proceedings are transcribed, where the trial court fails to enter any written order, there can be no appeal: "No order or judgment of a trial court is appealable until reduced to writing and filed with the trial court clerk." State v. Wells, 326 So.2d 175, 176 (Fla. 1976). The rules of appellate procedure define "rendition" of an order that is the subject of an appeal as "a signed, written order... filed with the clerk of the lower tribunal." Rule 9.020(h), Fla.R.App.P. Without such a signed and written order, "the threshold requirement for commencing an appeal cannot be met." State v. Phillips, 507 So.2d 1170, 1170 (Fla. 1st DCA 1987). See also Billie v. State, 473 So.2d 34 (Fla. 2nd DCA 1985) (where County Court judge orally granted defendant's motion to dismiss, but entered no written order of dismissal, state's appeal was required to be dismissed). A question arises as to what constitutes a written order. In State v. Phillips, supra, the trial judge wrote the words "granted after hearing" on the defendant's motion to suppress. The date and the judge's initials followed

these words. The First District held that this procedure did not comply with the requirement of a signed, written order filed with the clerk of the lower tribunal and, thus, the state could not appeal. In State v. Hines, 22 Fla.L.Weekly D1613 (Fla. 5th DCA March 7, 1997), the trial court entered its oral ruling on the defendant's ore tenus motion to suppress, in which the court stated that it was suppressing "everything that occurred at and after [the] pretextual stop...". 22 Fla.L.Weekly at D1614. However, the record on appeal contained no written suppression order (or, for that matter, any written motion to suppress). After the court made its oral ruling, the judge signed the court minutes, which noted "defense motion granted." Id. The Fifth District had problems with this procedure and "order." First, the Fifth District found that the judge's "oral ruling is unclear with respect to what evidence the court intended to suppress." Second, the court was disturbed by the fact that there was no written motion to suppress and directed that the state, on remand, supplement the record with such a written motion "if one exists." Id. As for the procedure employed by the trial judge in signing the court minutes after the notation "defense motion granted," the appellate court was willing to recognize that "the signing of court minutes indicating that a motion to suppress is granted is sufficient to constitute 'rendering' for jurisdictional purposes." Id. However, the Fifth District chastised the trial judge for not making a clear ruling and took the occasion "to remind

the trial court... of the importance of clearly stated... rulings." Id. Thus, it should be the practice of all trial judges in constructing orders that may be appealed to make clear rulings as to precisely what is being ordered (suppressed, excluded from evidence, etc.).

4. No Ruling. Apart from the problem of no written order and no transcription of proceedings below, parties appealing from proceedings below will have yet another problem where they fail to obtain any specific ruling by the trial judge. Again, it is the burden of the appealing party to make error appear. If the appealing party has failed to obtain any ruling, they will generally be precluded from asserting error on appeal. Thus, in Blackmon v. State, 588 So.2d 662, 663 (Fla. 1st DCA 1991), the defendant claimed on appeal that the trial judge erred in precluding his right to a full and fair cross examination of the sexual battery victim. The defense sought certain testimony by way of proffer of the victim and the trial judge permitted the proffer with respect to whether she had been coerced to testify. Following the proffer, "the trial court did not rule on the admissibility of this proffered testimony, nor did defense counsel seek a ruling on the matter." On appeal, the First District held that "the failure to obtain a ruling constituted a waiver of appellant's right to cross examine the victim further with respect to the matter." In this instance, the trial judge could not be faulted for failing to

make a ruling after the proffer. This does not mean, however, that trial courts can avoid reversal by the simple expedient of "stonewalling" whenever a party makes a motion. As recently observed by Fourth District Court of Appeal Judge Barbara Pariente, in addressing attorneys attending an appellate seminar:

You may have made the proper objection and made it timely, but if the trial court never actually sustains or overrules the objection, you have done nothing to preserve the issue for appellate review. Obtaining a ruling on your objection sounds easy, but I can't tell you the number of times that the colloquy on the objection continues but the trial court never actually rules. Most of the times the failure to rule is inadvertent; if it is deliberate there is nothing much you can do but there is appellate authority that allows for review if the trial court deliberately refuses to rule. [Emphasis added].

5. Reserved Ruling. A related problem for the party seeking to overturn the lower tribunal is where the judge reserves ruling. Clearly, as demonstrated above in Blackmon, supra, where the court reserved ruling and never actually ruled, absent any indication of a deliberate refusal to rule, the judge cannot be reversed. However, where a reservation of any ruling can be construed as tantamount to a denial of the relief being requested, the appellate court may well construe the "reservation" as an adverse ruling and reach the merits on

appeal. Thus, in Malcolm v. State, 414 So.2d 891 (Fla. 3rd DCA 1982), the Third District reversed a drug conviction based upon the trial court's erroneous admission of collateral crimes evidence. There, the defendant timely moved to exclude evidence of the defendant's involvement in an uncharged drug transaction; the trial judge denied the motion as premature, indicating that the evidence "might become admissible if the Williams criteria were later satisfied. 415 So.2d at 892 n.1. Subsequently, when the evidence in question was sought to be introduced, and defense counsel objected, "the court then reserved ruling." Id. Subsequently, the defense objection was sustained when the state failed to lay the proper predicate. In reversing the conviction, the Third District observed: "[A]lthough we need not directly decide the point, since the practical effect of reserving ruling was under these circumstances the same as overruling the objections, it may be that reversible error was committed... simply because the objections were not, as they should have been, immediately sustained." Id. It is strongly recommended that trial courts not "reserve" ruling on evidentiary and other issues, but make timely rulings before harmful evidence reaches a jury's ears.

## V. JUDICIAL PHILOSOPHY

- A. The little picture. Do you rule for the individual case and only the particular litigants appearing before you; after all, it's only County Court?
- B. The big picture. Do you rule with a

view toward the impact of your ruling on other litigants?

1. Setting precedent in County Court. Depending upon whether or not you are in a particular specialized division (i.e., domestic violence, DUI, small claims, etc.), the rulings you make and the orders you enter may or may not have an effect on future litigants. If the same attorneys (prosecutors, public defenders, specialized private practitioners) appear before you, your orders may well be relied upon to follow in similar cases. The doctrine of stare decisis does apply at all levels of the judicial system. Litigants and attorneys have a right to rely upon your prior rulings and orders.
  2. Certifying questions of great public importance. Will you issue orders that certify such questions to the District Court of Appeal pursuant to Rule 9.160, Fla.R.App.P.? See II.B.1.a-c, supra.
  3. Publishing your orders. Both Circuit and County Court orders may be sent for publication by you as the judge in Florida Law Weekly Supplement. See outline materials for method of publication.
- C. Fear of reversal. Will you rule differently depending on whether or not the proceedings are transcribed? As discussed earlier, absent a record of proceedings, a litigant will have an almost insurmountable burden in establishing error on appeal. Will you "stonewall" by failing to rule, or by failing to enter a written order which is a prerequisite to an appeal in most cases?

D. A method to the madness. Do you explain the reasoning you have employed in making your rulings? At the Judicial College, we were taught the dangers of "JADE" (don't Justify, Advise, Define, Explain). The rationale here is "the less said the better." This school of thought favors entering perfunctory orders ("This cause having come before the Court, the Court hereby denies the motion."). Appellate judges have cautioned that such a lack of explanation in our ruling leaves us at the mercy of the parties and, indeed, of the appellate courts. Appellate courts appreciate having the benefits of the trial judge's reasoning; it enhances the chances of affirming the ruling.