NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

ON APPEAL TO THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

APPELLATE DIVISION

MICHAEL RUSSE GREENFIELD

Appellant,

v.

Appeal Case No.: CRC 10- 00039 APANO
UCN No.: 522010AP000039XXXXCR

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed: 8/1/11.

Appeal from the County Court
for Pinellas County
County Judge Paul A. Levine

Charles E. Lykes, Esquire
Attorney for Appellant

Joseph T. Murray III,
Assistant State Attorney
Attorney for Appellee

ORDER AND OPINION

PER CURIAM

The defendant was arrested for driving on a suspended license and cited for a traffic infraction. He filed a motion to suppress on the grounds that the stop was unlawful. The defendant was not noticed for the hearing on the motion to suppress, but for some reason his

attorney said she was ready to proceed. The trial court heard the testimony of the arresting officer and denied the motion. The defendant entered a nolo contendere plea reserving his right to appeal denial of the motion to suppress. That ruling was dispositive; therefore, this matter is properly before the court.

The primary issue is whether it was proper for the trial judge to proceed in the absence of the defendant where counsel announced that she was ready to proceed. According to Florida Rule of Criminal Procedure, Rule 3.180(a)(3): "In all prosecutions for crime the defendant shall be present ... at any pretrial conference, unless waived by the defendant in writing." Fla. R. Crim. P. 3.180 (a)(3). In *Hall v. State*, 738 So.2d 374 (Fla. 1st DCA 1999), the court construed this provision to apply to a pretrial motion to compel the defendant to provide certain samples. "His lawyer purported to waive his right ... to attend. But the right to attend 'any pretrial conference,' Fla. R.Crim. P. 3.180(a)(3), is personal to the defendant and can only be waived 'by the defendant in writing.'" *Id.* at 375. Thus, the court found that it was error to proceed without the defendant. In this case, the error is more apparent than in *Hall* because the defendant here didn't even get notice of the proceeding much to the understandable chagrin of the trial judge.

In *Hall*, the court found that the error was harmless because no evidence was taken, the motion to compel could have been decided without hearing argument of counsel, and the issues raised in the motion to compel were subsequently revisited in Mr. Hall's presence at a hearing on a motion to suppress. In contrast, in the instant case, extensive testimony was taken from the arresting officer and it partially involved the physical appearance of the defendant, the motion could not have been decided without argument, and this was the one and only time the disputed issues were considered. This was a completely different situation than the one in *Hall* and the error cannot be said to be harmless.

In *Hall*, at 375-76, the court wrote: "When the rule requiring the defendant's attendance at pretrial conferences is violated, 'it is the constitutional question of whether fundamental fairness has been thwarted which determines whether the error is reversible.' *Garcia v. State*, 492 So.2d 360, 364 (Fla.1986). See *Roberts v. State*, 510 So.2d 885, 891 (Fla.1987)." Based on the analysis in *Hall* and the record in the instant case this Court concludes that " 'fundamental fairness had been thwarted.'" This error requires that the trial court conduct the hearing on the motion to suppress again in the presence of the defendant or with a written waiver from him.

ACCORDINGLY, THIS COURT REVERSES THE ORDER ON THE MOTION TO SUPPRESS AND THE JUDGMENT AND SENTENCE AND REMANDS WITH INSTRUCTIONS THAT THE TRIAL COURT PROCEED IN A MATTER CONSISTENT WITH THIS OPINION.

DONE AND ORDERED at Pinellas County, Florida this 1st day of Aug, 2011.

Original order entered on August 1, 2011 by Circuit Judges David A. Demers, Thane B. Covert, and Chris Helinger.

Copies:

The Honorable Judge Paul A. Levine

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Attorney for Appellant

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