

SUPREME COURT OF FLORIDA

CASE NO. SC06-2018

DANIEL RAY ERICKSON,

Petitioner,

v.

Case No. 5D05-3967

TOMMY GAIL BREEDLOVE,
et al.,

Respondents.

**ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA**

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case

This case comes before the Court on conflict certified by the Fifth District Court of Appeal. In its Opinion, the Fifth District affirmed the trial court's dismissal of the *pro se*, incarcerated plaintiff's action for failure to prosecute. The Fifth District found that the existence of a pending motion for reconsideration of the trial court's order dismissing the complaint with leave to amend did not establish good cause why the action should remain pending under Rule 1.420(e) of the Florida Rules of Civil Procedure. The Fifth District certified conflict with *Dye v. Security Pacific Financial Services*, 828 So. 2d 1089 (Fla. 1st DCA 2002).

Course of Proceedings

On September 24, 2003, Petitioner, Daniel Ray Erickson (the "Petitioner"), a *pro se* plaintiff below, filed a thirty-eight page complaint against various government agencies and government employees. The complaint alleged causes of action for false arrest, negligence, perjury, obstruction of justice, malpractice, invasion of privacy, malicious prosecution, and conspiracy. (R-I-1-38.)¹ Included among the named defendants were the Florida Department of Law Enforcement ("FDLE"), the Office of the State Attorney for the Fifth Judicial Circuit and its

¹ References to the trial court's record on appeal will appear as "R," followed by citations to the specific volume and page numbers (*e.g.*, R-I-1). References to the record on appeal in the Fifth District Court of Appeal will appear as "5DCA R," followed by a citation to the specific page number (*e.g.*, 5DCA R-14.)

employees, Peter Frank Magrino and Marlene Kobitz Wells, and the Hernando County Sheriff's Office ("HCSO") and its employees, Tommy Gail Breedlove, Frank Loreto, Jr., Brian Keith McGinnis, Charles Eddy Nugent Jr., Kathleen Marie Nover Reid, Kenneth R. Frazier Jr., Ignacio Velez Jr., and Jeffrey N. Kraft Jr. (collectively referred to herein as the "Respondents"). (*Id.*) Petitioner's causes of action related to his claim that in February, 2002, he was wrongfully arrested and thereafter illegally prosecuted for failure to register as a sexual offender. (*See id.*; *see also* Appendix, Tab G, at 1.)² His mother, Florence Irene Brown, was also named a plaintiff. (R-I-1.)

Respondents filed motions to dismiss the complaint. (App.-G-1; *see also* R-I-39-44; R-I-52-56.) While the motions to dismiss were pending, the Petitioner served requests for admissions, to which the Respondents objected. (R-I-57-80.) Petitioner also filed a motion to transfer the case to the trial judge responsible for handling the related criminal matters (R-I-82) and motions to strike the motions to dismiss, based on the alleged conflicts of interest of the attorneys representing the HCSO and the State Attorney's Office (R-I-46-48; R-I-49-51). Petitioner asked the trial court, in a written "Motion for Hearing at Court's Convenience," to

² References to the Appendix to the Initial Brief of the Petitioner will appear as "App.," followed by citations to the specific tab and record page numbers (*e.g.*, App-A-101).

schedule a hearing. (R-I-45.) At that time, Petitioner listed his home address as Spring Hill, Florida. (*See id.*)

Thereafter, Petitioner was incarcerated with the Florida Department of Corrections. (*See R-I-84.*) On March 16, 2004, months after his written request for a hearing (R-I-45), a judicial staff attorney with the Fifth Judicial Circuit wrote the Petitioner to inform him that a telephone hearing had been scheduled for March 31, 2004, on all pending motions. (R-I-83.) The judicial staff attorney's letter informed the Petitioner that it was his responsibility "to place the call at the appointed time" if he "wish[ed] to appear by telephone." (*Id.*)

On March 18, 2004, Petitioner filed a Request for Telephone Conference, in which he informed the trial court that although he wished to appear by telephone at the scheduled March 31, 2004 hearing, he was temporarily housed at the Central Florida Reception Center and could not attend. (R-I-84.) Petitioner asked the trial court to

make arrangements with the Department of Corrections in Orlando for a telephonic hearing OR issue an Order holding the entire case, including filed motions in abeyance until 2005 [for resolution of the underlying criminal case].

(*Id.*; *see also R-I-85 (Motion to Hold Case in Abeyance).*) Petitioner also sent a note to the trial court's law clerk, which stated:

Please set up a phone conference. They won't do that [without] a letter a[nd] order.

(R-I-86.) On March 31, 2004, the trial court held its hearing on the pending motions and objections. (R-I-101-103; App.-A-101-103.)

On April 16, 2004, Petitioner filed yet another motion to hold his case in abeyance until the resolution of his criminal appeal. (R-I-89.) As support for his Motion to Hold Case in Abeyance Til 2005, Petitioner filed his affidavit and the Affidavit of Florence I. Brown, which explained the inability of either plaintiff to appear by telephone at the March 31, 2004 hearing. (R-I-90-91.)

After the March 31, 2004 hearing – but before the trial court issued its written order – Petitioner served and filed the Motion for Reconsideration and/or For Clarification (the “Motion for Reconsideration”). (R-I-92-100; App.-B.) The *pro se*, incarcerated Petitioner again explained in his Motion for Reconsideration why he was unable to appear by telephone at the March 31, 2004 hearing. (App.-B-93-94.) According to the Petitioner, although the trial court’s staff attorney had “mail[ed] a letter saying it was Mr. Erickson’s responsibility to arrange a call,” this “is contrary to D.O.C. rules over which Mr. Erickson has NO control.” (*Id.* at 93.) Petitioner explained instead that “[a] letter must be sent to the Classification Officer by AN ATTORNEY.” (*Id.*)

Petitioner also informed the trial court that although he had requested phone time for the hearing from his classification officer, his request had not been approved. (*Id.*; *see also* R-I-90.) Petitioner referred to his affidavit, filed April 16,

2004, in which he averred that “D.O.C. Rules allow [only] collect attorney phone calls” and that his classification officer had “stated NOT to have anyone call her about the Affiant.” (R-I-90.)

According to the Petitioner, even if he had been permitted to telephone the trial court’s courtroom or chambers on March 31, 2004, his call “would not have gone through.” (App.-B-93-94.) He referenced the inability of his mother (also named a plaintiff in the action) to appear by telephone. (*Id.* at 93; *see also* R-I-91.) Petitioner claimed that “[t]his appears a border line violation of due process in having no meaningful opportunity to be heard.” (*Id.* at 94.)

As grounds for relief, Petitioner requested an additional sixty days in which to file an amended complaint. (App.-B-98.) Petitioner sought clarification of the relief sought by the Respondents in the motions to dismiss, and asked the trial court to simply order the substitution of certain named Respondents (*e.g.*, “Richard Nugent, Sheriff of Hernando County in his official capacity” and “Brad King, State Attorney for the Fifth Judicial Circuit in his official capacity”) without requiring the filing of an amended complaint. (*Id.* at 99.) Petitioner also asked the trial court to reconsider its ruling upholding the objections to the requests for admissions and its refusal to disqualify defense counsel. (*See id.* at 94-95, 95-98, 100.)

Thereafter, on April 23, 2004, the trial court entered its Order on Pending Motions and Objections (the “Order on Pending Motions”). (R-I-100-102; App.-

A.) The trial court specifically noted in its Order that “Plaintiff Erickson did not appear by telephone for the hearing,” despite having been informed of the telephone hearing by letter from the trial court’s staff attorney. (*Id.* at 101-102.) Nowhere in the Order did the trial court mention the Petitioner’s written request to schedule the telephonic hearing with the Department of Corrections in Orlando or to hold the entire case in abeyance. (*See id.* at 101-103.)

The trial court granted the Respondents’ motions to dismiss without prejudice in its Order, but allowed the Petitioner leave to file an amended complaint within twenty days. (*Id.* at 102.) The trial court also sustained the Respondents’ objections to the Petitioner’s requests for admission, denied the Petitioner’s objections to the alleged conflicts of interest of defense counsel, and denied the Petitioner’s motion to transfer the case. (*Id.*)

Thereafter, Respondents served and filed responses to the Petitioner’s Motion to Hold Case in Abeyance (R-I-104-110) and the Motion for Reconsideration (R-I-111-13). On May 17, 2004, Petitioner filed written answers to the responses, in which he reiterated his inability to appear by telephone at the March 31, 2004 hearing. (R-I-118-19; R-I-120-21). He asked the trial court to “vacate the April 2004 order” dismissing the complaint because “due process was violated.” (*Id.* at 119.)

The next record activity in the case occurred more than a year later, when several Respondents moved to dismiss the action for failure to prosecute. (R-I-122-25; App.-C.) A telephonic hearing on the Motion to Dismiss for Failure to Prosecute was set for October 18, 2005. (*See* R-I-126-27.)

On October 5, 2005, the *pro se*, incarcerated Petitioner served his Answer to Defendant's Motion to Dismiss. (R-I-128-129; App.-D.) In his written response, Petitioner emphasized that his Motion for Reconsideration – which had been filed with the clerk and delivered to the trial court's chambers more than a year before – remained pending. (App.-D-129 (“On the FACE OF THE RECORD, the Motion for Reconsideration is STILL PENDING!” (emphasis in original).) Petitioner also explained that a motion for reconsideration “usually does not need to have an oral argument, thus no hearing is mandated” and that, in any event:

Plaintiff Erickson was housed in the Department of Corrections at the time and thus, as the courts know, couldn't set an oral hearing.

(*Id.*)

Together with his written response, Petitioner filed a “Motion on Telephonic Hearing,” in which he requested a continuance of the scheduled October 18, 2005 hearing until a date and time “in accordance with the calendar of Judge Merritt[] . . . [and] with DOC policy.” (R-I-126.) Petitioner informed the trial court of his inability to “set up a telephonic hearing under the rules of the Department of

Corrections,” which instead “MUST be set by the MOVANT as inmates are not attorneys and security concerns are paramount.” (*Id.*) The trial court did not continue the scheduled hearing or otherwise rule on the Motion on Telephonic Hearing.

Instead, after the October 18, 2005 hearing, the trial court granted the Motion to Dismiss for Failure to Prosecute. (*See* R-I-131-33; App.-E.) The trial court found “no good cause to justify allowing the action to remain pending” and dismissed the action without prejudice. (App.-E-132.)

Disposition Below

On appeal, the Fifth District Court of Appeal affirmed the trial court’s ruling that the Petitioner “did not meet his burden of establishing good cause” under Rule 1.420(e) of the Florida Rules of Civil Procedure (2005). *Erickson v. Breedlove*, 937 So. 2d 805 (Fla. 5th DCA 2006). (App.-G.)³ According to the Fifth District:

The record is devoid of any evidence that the trial court was even made aware of the existence of the motion for reconsideration. Trial judges should not be expected to unilaterally review the hundreds of files assigned to them in search of motions which have been filed but have not been set for hearing or otherwise brought to the court’s attention. Litigants have an affirmative obligation to move their cases to resolution. *See Sewell Masonry Co.*

³ Although Rule 1.420(e) was amended January 1, 2006, “all of the relevant events at the trial court level occurred prior to the effective date of the amendment.” (App.-G-2, n.1.) Thus, the 2005 version of Rule 1.420(e) applies. (*Id.* (citing *Cabrera v. Pazos, Larrinaga & Taylor, P.A.*, 922 So. 2d 422, 424 n.2 (Fla. 2d DCA 2006).)

v. DCC Cons., Inc., 862 So. 2d 893, 899 (Fla. 5th DCA 2003), *rev. dismissed*, 870 So. 2d 823 (Fla. 2004); *Patton v. Kera Technology, Inc.*, 895 So. 2d 1175 (Fla. 5th DCA), *rev. granted*, 912 So. 2d 318 (Fla. 2005).

(App.-G-2-3.) The Fifth District certified conflict with *Dye v. Security Pacific Financial Services*, 828 So. 2d 1089 (Fla. 1st DCA 2002), in its Opinion.

Petitioner timely filed his notice to invoke discretionary jurisdiction. (5DCA R-14-15.) This Court appointed the undersigned counsel to represent the Petitioner. (5DCA R-16; 5DCA R-17-18.) The Court postponed its decision on jurisdiction and ordered the Petitioner to file an initial brief on the merits. (5DCA R-17-18.)

SUMMARY OF ARGUMENT

Petitioner respectfully requests that the Court resolve the conflict between the Fifth District's Opinion and the decisions of this Court in *Patton v. Kera Technology, Inc.*, 2006 Fla. LEXIS 2546, 31 Fla. L. Weekly S700 (Fla. Oct. 26, 2006), and *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063 (Fla. 2000), to find that Petitioner showed good cause why his action should remain pending under Rule 1.420(e) of the Florida Rules of Civil Procedure. Because the Fifth District did not consider whether Petitioner's pending Motion for Reconsideration was a dispositive motion – or otherwise provided good cause for the lack of record activity during the one-year period – its Opinion must be quashed, and this case remanded.

The record before this Court reflects that the Petitioner met his burden of establishing good cause under Rule 1.420(e). Petitioner did not expect the trial court to unilaterally review the hundreds of files assigned to it in search of a motion which had been filed but not set for hearing or otherwise brought to the court's attention, as the Fifth District ruled. Instead, the record reflects that the *pro se*, incarcerated Petitioner informed the trial court, in a timely written showing of good cause, that a dispositive Motion for Reconsideration – which had been filed and served upon opposing counsel and the trial court's chambers more than seventeen months before – remained pending before the trial court. In his written showing of good cause, the *pro se*, incarcerated Petitioner also reminded the trial court that Department of Corrections' regulations governing inmate telephone use prohibited any attempt by the Petitioner to call the trial court or opposing counsel to schedule a hearing on the pending Motion.

Aside from the Petitioner's inability to set the pending Motion for Reconsideration for hearing, the trial court alone had the discretion to determine whether to even entertain the Motion,⁴ and the Fifth Judicial Circuit's established motion practice procedure allowed the trial court to rule on motions without oral

⁴ See *Commercial Garden Mall v. Success Academy, Inc.*, 453 So. 2d 934, 936 (Fla. 4th DCA 1984) (finding that a trial court “had the discretion to entertain a petition for rehearing [directed to a non-final order] if it chose to do so”).

argument, unless requested by either party *and* granted by the court.⁵ Because the Petitioner could not compel the trial court to rule on the pending Motion for Reconsideration or set the Motion for hearing on the trial court’s calendar, the trial court – not the Petitioner – had the duty to proceed. *See Lucaya Beach Hotel Corp. v. MLT Mgmt. Corp.*, 898 So. 2d 1118, 1120 (Fla. 4th DCA 2005) (relying on *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063 (Fla. 2000), to find that the plaintiff showed good cause as to why the action should remain pending because “the trial court’s announced policy of setting special motions itself compelled it to set the defendants’ motions to dismiss and for summary judgment for hearing”; “[a]ll the parties could do was to request the court take action”). Petitioner showed good cause under Rule 1.420(e) why his action should remain pending.

Petitioner is entitled to reversal for yet another reason: the trial court violated the Petitioner’s constitutional right to access to courts. Art. I, § 21, Fla. Const.; *see also* § 944.292(2), Fla. Stat. (providing that the suspension of a prisoner’s civil rights “shall not be construed to deny a convicted felon access to the courts”). The trial court violated the Petitioner’s due process rights when it dismissed the action without addressing the *pro se*, incarcerated Petitioner’s

⁵ *See* Admin. Order No. H-2003-10, 5th Judicial Circuit, in and for Hernando County, Fla. (establishing motion practice procedure; available on-line at <http://www.circuit5.org/H2003-10>). (App.-F.)

inability to schedule or attend a hearing on his pending Motion for Reconsideration.

By refusing to set the pending Motion for hearing – or to allow the Petitioner a reasonable opportunity to attend by telephone – the trial court deprived the Petitioner of any opportunity to seek meaningful relief in his civil action, which arises from the same alleged criminal conduct for which he was imprisoned. For this reason, Petitioner asks that this Court quash the Fifth District’s Opinion, and remand to allow the Petitioner an opportunity to prosecute his civil action.

ARGUMENT

Standard of Review

“The standard of review of the trial court’s dismissal for lack of ‘good cause’ under Rule 1.420(e) is abuse of discretion.” *Chase v. Lavender*, 810 So. 2d 1004, 1005 (Fla. 5th DCA 2002); *accord Patton v. Kera Tech., Inc.*, 2006 Fla. LEXIS 2546, 31 Fla. L. Weekly S700 (Fla. Oct. 26, 2006).

I. THIS COURT HAS JURISDICTION TO REVIEW THE FIFTH DISTRICT’S OPINION, WHICH CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

Petitioner respectfully submits that this Court has jurisdiction to review the Opinion of the Fifth District Court of Appeal. Art. V, § 3(b)(3) & (4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(a)(iv) & (vi).

Rule 1.420(e) of the Florida Rules of Civil Procedure “creates a mechanism for the dismissal of actions that have not been diligently prosecuted.” *Patton v. Kera Tech., Inc.*, 2006 Fla. LEXIS 2546, at 2. When the trial court dismissed the Petitioner’s action, Rule 1.420(e) provided:

All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 1 year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

Fla. R. Civ. P. 1.420(e) (2005).

Determination of whether an action should be dismissed for failure to prosecute under Rule 1.420(e) requires a two-part test. *Patton*, 2006 Fla. LEXIS 2546, at 2-3; *Wilson v. Salamon*, 923 So. 2d 363, 368 (Fla. 2005). “First, the defendant must show that there was no record activity for the year preceding the motion.” *Metropolitan Dade Cty. v. Hall*, 784 So. 2d 1087, 1090 (Fla. 2001). “[I]f a review of the face of the record reveals activity by ‘filings of pleadings, order of court, or otherwise,’ an action should not be dismissed.” *Wilson*, 923 So. 2d at 368; *accord Hall*, 784 So. 2d at 1090. If there is no record activity on the face of the record, “the second step is to determine whether the plaintiff has established

good cause why the action should remain pending.” (App.-G-2); *accord Hall*, 784 So. 2d at 1090.

Here, it is undisputed that there was no record activity in this case for more than a year. (App.-G-2.) Consequently, the Fifth District considered only “whether the existence of the motion for reconsideration constituted ‘good cause’ so as to prevent a dismissal for failure to prosecute.” (*Id.*)

The Fifth District affirmed the trial court’s ruling that the *pro se*, incarcerated Petitioner did not meet his burden of establishing good cause to prevent the dismissal of his action for lack of prosecution, notwithstanding the pending Motion for Reconsideration. The Fifth District found the record “devoid of any evidence that the trial court was even made aware of the existence of the motion for reconsideration.” (App.-G-2-3.) According to the Fifth District:

Trial judges should not be expected to unilaterally review the hundreds of files assigned to them in search of motions which have been filed but have not be set for hearing or otherwise brought to the court’s attention. Litigants have an affirmative obligation to move their cases to resolution.

(*Id.* at 3.)

The Fifth District certified conflict with *Dye v. Security Pacific Financial Services, Inc.*, 828 So. 2d 1089 (Fla. 1st DCA 2002). In *Dye* the First District relied on *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063 (Fla. 2000), to rule that the existence of any pending motion necessarily precluded the dismissal of an action

for failure to prosecute. 828 So. 2d at 1089. *Dye* also reiterated the established rule that

whenever a dispositive motion is pending before the court, and the parties are awaiting the court's ruling on that motion, the duty to proceed rests squarely upon the court. During that period of the court's deliberation, the cause cannot be dismissed for lack of record activity.

Id. (quoting *Lukowsky v. Hauser & Metsch, P.A.*, 677 So. 2d 1383, 1384 (Fla. 3d DCA 1996), approved, *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063 (Fla. 2000)).

On October 26, 2006, this Court approved the Fifth District's ruling in *Patton v. Kera Technology, Inc.*, 895 So. 2d 1175 (Fla. 5th DCA 2005), which expressly and directly conflicted with the First District's decision in *Dye* and the Third District's decision in *Lukowsky*. See *Patton v. Kera Tech., Inc.*, 2006 Fla. LEXIS 2546, 31 Fla. L. Weekly S700a (Fla. Oct. 26, 2006). In *Patton* the Court disapproved of *Dye* and *Lukowsky* to the extent that the First and Third Districts relied only on the existence of a pending motion to preclude dismissal, without addressing whether the pending motion itself provided good cause. 2006 Fla. LEXIS 2546, at 3.

Patton does not resolve the case now before this Court. Notwithstanding its disapproval of certain aspects of *Dye* and *Lukowsky*, the Court specifically recognized in *Patton* that “[i]f petitioners could have shown that a dispositive motion remained pending, in which the trial judge had not issued even an oral

ruling, that would have furnished good cause under the rule.” 2006 Fla. LEXIS 2546, at 3; accord *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1066 (Fla. 2000); *Dye*, 828 So. 2d at 1089; *Lukowsky*, 677 So. 2d at 1384. According to *Patton*:

In a situation where there is a pending motion, the issue when applying the second step is whether the pending motion provided good cause why there was no record activity during the one-year period.

2006 Fla. LEXIS 2546, at 3.

Consequently, *Patton* does not entirely disapprove of *Dye* and *Lukowsky*. See *Patton*, 2006 Fla. LEXIS 2546, at 4. While *Patton* establishes that the mere existence of any pending motion may not be sufficient to avoid dismissal under Rule 1.420(e), once a party shows that a dispositive motion remains pending – or that the pending motion otherwise “provided good cause why there was no record activity during the one-year period” – the burden of establishing good cause under the Rule is met. See *id.* at 3.

Here, neither the trial court below nor the Fifth District addressed whether the Petitioner’s pending Motion for Reconsideration was a dispositive motion or otherwise provided good cause for the lack of record activity during the one-year period. Instead, the Fifth District considered only “whether the existence of the motion for reconsideration constituted ‘good cause’ so as to prevent a dismissal for failure to prosecute.” (App.-G-2.) Finding that the record is “devoid of any

evidence that the trial court was even made aware of the existence of the motion for reconsideration” – and that litigants generally “have an affirmative obligation to move their cases to resolution” – the Fifth District affirmed the trial court’s dismissal of the Petitioner’s action under Rule 1.420(e). (*Id.* at 2-3.)

Thus, the Fifth District’s Opinion conflicts with the decisions of this Court in *Patton* and *Fuster-Escalona* and with the decisions of the First and Third Districts in *Dye* and *Lukowsky*, all of which establish that a pending dispositive motion may furnish good cause under the Rule. The Court has jurisdiction to resolve the conflict. *See* Art. V, § 3(b)(3) & (4), Fla. Const.; *see also* Fla. R. App. P. 9.030(a)(2)(A)(iv) (decisions that expressly and directly conflict with decisions of other district courts of appeal or the supreme court on the same question of law); Fla. R. App. P. 9.030(a)(2)(A)(vi) (decisions certified to be in conflict with decisions of other district courts of appeal).

II. BECAUSE THE PETITIONER SHOWED GOOD CAUSE WHY THERE WAS NO RECORD ACTIVITY DURING THE ONE-YEAR PERIOD, THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE ACTION FOR FAILURE TO PROSECUTE UNDER RULE 1.420(E).

The Fifth District failed to consider whether the pending Motion for Reconsideration provided good cause why there was no record activity during the one-year period, as *Patton* requires. Petitioner respectfully submits that he met his burden of showing good cause under Rule 1.420(e), for the following reasons:

A. Petitioner’s pending Motion for Reconsideration was a dispositive motion.

First, the record reflects that the Petitioner showed that a dispositive motion remained pending before the trial court, as to which the trial court had not even issued an oral ruling. For this reason alone, the trial court’s dismissal of the action under Rule 1.420(e) must be reversed. *See Patton*, 2006 Fla. LEXIS 2546, at 3; *accord Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1065 (Fla. 2000).

Under Florida law, “a trial court has the inherent discretionary power to reconsider any order entered prior to rendition of the final judgment in the cause.” *Arnold v. Massebeau*, 493 So. 2d 91, 92 (Fla. 5th DCA 1986); *accord Commercial Garden Mall v. Success Academy, Inc.*, 453 So. 2d 934, 935 (Fla. 4th DCA 1984) (citing *North Shore Hosp., Inc. v. Barber*, 143 So. 2d 849 (Fla. 1962)). Although petitions for rehearing as to non-final orders are not “authorized” and do not toll the time for rendition, *Arnold*, 493 So. 2d at 92, the trial court nonetheless had the authority to consider the Petitioner’s timely Motion for Reconsideration of the non-final Order dismissing the complaint. *See Commercial Garden Mall*, 453 So. 2d at 935; *Arnold*, 493 So. 2d at 92; *see also* Fla. R. App. P. 9.020(h) (defining “rendition”).

Had the trial court chosen to entertain the Motion for Reconsideration, the time for service of the Petitioner’s amended complaint would have been tolled. Because Petitioner specifically sought an additional sixty days to amend the

complaint in his Motion for Reconsideration (*see* R-I-98), any consideration of that Motion by the trial court necessarily would have tolled the time for the filing of the amended complaint. *See Commercial Garden Mall*, 453 So. 2d at 935 (finding that the trial court abused its discretion in dismissing a second amended complaint, which was filed twelve days after the court denied the motion for rehearing; once the trial court chose to entertain the motion for rehearing, the twenty-day time period for filing the second amended complaint was impliedly tolled).

In addition, Petitioner asked the trial court to simply order the substitution of certain named defendants without requiring the filing of an amended complaint. (R-I-99.) Petitioner's Motion for Reconsideration sought clarification of the Order dismissing the complaint (*id.*), which – if granted – again would have altered the original Order.

Under *Patton*, the Petitioner's pending, dispositive motion established good cause under Rule 1.420(e). There is no question here that in the more than seventeen months that the Motion for Reconsideration had been pending, the trial court had not decided whether to even grant a hearing on the pending Motion. Because Petitioner showed the trial court that he was awaiting a ruling on his dispositive motion (R-I-128-29), his action should not have been dismissed under Rule 1.420(e).

Nonetheless, the Fifth District affirmed the dismissal, finding that the record is “devoid of any evidence that the trial court was even made aware of the existence of the motion for reconsideration.” (App.-G-2-3.) This conclusion is contrary to the facts of this case and the plain language of the Rule.

The record reflects that the Petitioner did meet his burden of establishing good cause. Petitioner’s timely, written showing of good cause (filed almost two weeks before the hearing)⁶ specifically stated that the Motion for Reconsideration, which had been served upon opposing counsel *and the trial court’s chambers more than a year before*, remained pending “on the face of the record.” (R-I-128-29; App.-D-129-29.) The record is undisputed that the trial court had not ever granted the Petitioner a hearing on his pending Motion for Reconsideration, much less issued any ruling. Petitioner did not expect the trial court to “unilaterally review the hundreds of files assigned to [it] in search of motions which have been filed but

⁶ The *pro se*, incarcerated Petitioner delivered his Answer to the Motion to Dismiss to the correctional institution for mailing on October 5, 2005, thirteen days before the scheduled October 18, 2005 hearing. (R-I-128-29; App.-D.) Under the mailbox rule, the Petitioner’s written response is timely filed. *See Haag v. State*, 591 So. 2d 614 (Fla. 1992) (finding that the federal “mailbox rule exists as a matter of Florida law”); *accord Griffin v. Sistuencck*, 816 So. 2d 600, 603 (Fla. 2002) (ruling that an inmate’s *pro se* notice of appeal was timely filed because the inmate’s certificate of service reflected that the notice had been mailed within thirty days after the dismissal of the complaint); *Gonzalez v. State*, 604 So. 2d 874, 876 (Fla. 1st DCA 1992) (finding that the mailbox rule “should not be limited solely to the petitions or notices of appeal in court, but should instead be uniformly applied whenever a *pro se* inmate is required to use the U.S. mail to file documents within a limited jurisdictional time frame”).

have not been set for hearing or otherwise brought to the court’s attention,” as the Fifth District ruled. (App.-G-3.)

And to the extent that the Fifth District requires the Petitioner to submit *evidence* of good cause, its ruling contradicts the plain language of the Rule. Nothing in the plain language of the Rule requires that a showing of “good cause in writing” can be satisfied only by sworn affidavits or other evidence, especially when the record itself reflects a trial court’s failure to rule (or even grant a hearing) on a pending dispositive motion. *Cf. Patton*, 2006 Fla. LEXIS 2546, at 3 (finding that the petitioners had not timely submitted evidence to resolve a question of fact as to whether the trial court had orally ruled on the pending motions); *Smith v. Buffalo’s Original Wings & Rings II of Tallahassee, Inc.*, 765 So. 2d 983, 983 (Fla. 1st DCA 2000) (requiring “a showing of good cause by evidence of record” to support the plaintiff’s claim that her health problems constituted good cause to avoid dismissal).

Nor have Florida courts interpreted the Rule to allow a party to avoid dismissal only upon sworn evidence of good cause – especially when the record itself reflects good cause. In *Huertas v. Palm Beach County*, for example, the Fourth District Court of Appeal found that a memorandum of law filed in opposition to the defendants’ motions to dismiss for lack of prosecution “constitute[d] the filing of a written document of ‘good cause’ required by Florida

Rule of Civil Procedure 1.420(e).” 602 So. 2d 553, 553 (Fla. 4th DCA 1992). Consequently, the Fourth District reversed its prior ruling that the plaintiff had not submitted “good cause in writing” at least five days before the hearing on the motion to dismiss under Rule 1.420(e). *Id.*

Contrary to the Fifth District’s ruling, Petitioner showed that a dispositive motion remained pending, as to which the trial court had not issued even an oral ruling. Because Petitioner furnished good cause under Rule 1.420(e), the trial court abused its discretion in dismissing the action for failure to prosecute. *See Patton*, 2006 Fla. LEXIS 2546, at 3; *accord Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1065-66 (Fla. 2000); *Kimmins Corp. v. Crawford & Co.*, 2006 Fla. App. LEXIS 19313, No. 1D05-4375 (Fla. 1st DCA Nov. 17, 2006); *Cincinnati Equitable Ins. Co. v. Hawit*, 933 So. 2d 1233, 1236 (Fla. 3d DCA 2006) (citing *Lukowsky*). The Fifth District’s Opinion must be quashed, and this case remanded.

B. The trial court alone had the discretion to decide whether to grant a hearing on the pending Motion for Reconsideration.

Even if this Court finds that the Motion for Reconsideration is not a dispositive motion, the nature of the pending Motion – together with the trial court’s own policy and procedure – necessarily rendered the Petitioner unable to set his Motion for Reconsideration for hearing. Once again, the Fifth District erroneously affirmed the trial court’s dismissal of the Petitioner’s action without

considering whether the pending motion itself provided good cause why there was no record activity during the one-year period.

Given the nature of the pending Motion for Reconsideration, the Petitioner's failure to request a hearing is irrelevant. *See Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1066 (Fla. 2000) (considering motion to disqualify). Unlike a motion to dismiss the complaint or motion for judgment on the pleadings – which must be heard – the filing of a motion for rehearing or reconsideration did not entitle the Petitioner to a hearing. *Compare* Fla. R. Civ. P. 1.140(d) (providing that Rule 1.140(b) defenses, and a motion for judgment under Rule 1.140(c), “shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination shall be deferred until the trial”) *with* Fla. R. Civ. P. 1.530(a) (“On a motion for rehearing of judgments . . . the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment.”). Aside from the trial court's discretion in ruling on a motion for rehearing, whether to even entertain a motion for rehearing is within the trial court's discretion alone. *See Commercial Garden Mall v. Success Academy, Inc.*, 453 So. 2d 934, 935 (Fla. 4th DCA 1984).

Because the trial court “had the discretion to entertain a petition for rehearing [directed to a non-final order] if it chose to do so,” *id.* at 935, Petitioner had no choice but to wait for the trial court to determine whether it would grant

relief on the pending Motion for Reconsideration, schedule the Motion for hearing, or deny the Motion outright. Petitioner was well aware of the trial court's discretion in ruling upon the Motion for Reconsideration. (*See* App.-D-129 (arguing that “[a] Motion for Reconsideration usually does not need to have an oral argument, thus no hearing is mandated.”).) Whatever its determination, the trial court had a duty to rule upon the Motion for Reconsideration and announce its order within a reasonable time. *See* Fla. R. Jud. Admin. 2.050(f).

Accordingly, even if the “better practice” may have been for the Petitioner “to request a hearing date in order to ensure that the trial court would address his motion,” *Fuster-Escalona*, 781 So. 2d at 1066, he should not have been required to do so. In finding that the Petitioner had the duty to schedule his pending Motion for hearing, the Fifth District ignored the policies and procedures of the Fifth Judicial Circuit, which imposed a duty to rule on the pending Motion upon the trial court.

The Motion Practice Procedure established by the Fifth Judicial Circuit allowed the trial court to rule on motions in civil cases without oral argument (with the exception of certain motions not relevant here) upon the filing of a written motion and supporting brief. *See* Admin. Order No. H2003-10, Fifth Judicial Circuit, in and for Hernando County (App.-F). Indeed, upon the filing of a

response by opposing counsel (to be filed ten days after service of the motion and supporting brief), the Administrative Order directs that

[t]he Court will thereafter rule on said motion without oral argument, unless either party requests same, and the Court grants such request. In such event, the Court will set the matter for oral argument[] at the first time on the Court's docket.

(App.-F-2.)⁷

Doubtless, Respondents will argue that there is no evidence that the trial court implemented this procedure. (*See* 5DCA R-Tab B, at 26 n.5.) Review of the record reveals, however, that the parties, in accordance with the Administrative Order, filed motions, supporting memoranda of law, responses to motions, and requests to schedule hearings. (*See, e.g.*, R-I-45 (Plaintiff's Motion for Hearing at Court's Convenience); R-I-52-56 (Defendants' Motion to Dismiss Complaint and Memorandum of Law); R-I-84-86 (Plaintiff's Request for Telephone Conference); R-I-104-110 (Response to Plaintiff's Motion to Hold Case in Abeyance); R-I-111-13 (Defendants' Response to Plaintiff's Motion for Reconsideration and/or Clarification).)

The trial court alone had the authority to schedule the Motion for Reconsideration for hearing. Its Motion Practice Procedure required the trial court

⁷ The Administrative Order further provides that "[n]o hearings will be scheduled unless and until the above written brief requirements are met; and failure to comply therewith will result in the Court granting or denying the motion by default." (App.-F-2 (emphasis in original).)

either to schedule the Motion for Reconsideration for oral argument at the request of *either* party, or to rule on the Motion without oral argument. (*See* App.-F-1-2.)

All the parties could do was to request the court take action. The court thus placed on itself the duty to advance the case by setting motions on its calendar.

Lucaya Beach Hotel Corp. v. MLT Mgmt. Corp., 898 So. 2d 1118, 1120 (Fla. 4th DCA 2005).

“The duty to proceed rested squarely upon the trial court.” *Id.* (citing *Fuster-Escalona*, 781 So. 2d at 1054). Because the trial court “failed to set the motion[] for hearing in accordance with its established procedures,” Petitioner’s action should not have been dismissed for lack of prosecution under Rule 1.420(e). *Id.*; accord *Fuster-Escalona*, 781 So. 2d at 1054; see also Fla. R. Jud. Admin. 2.085(b) (requiring trial judges to “take charge of all cases at an early stage in the litigation” and “control the progress of the case thereafter until the case is determined”); *Wilson v. Salamon*, 923 So. 2d 363, 370 (Fla. 2005) (Pariente, C.J., concurring) (noting that although “much of the burden of moving cases to conclusion should remain on the litigants, trial court judges have an obligation to ensure that cases do not languish on the docket”); *Carlson v. Jeflis Prop. Mgmt.*, 904 So. 2d 642 (Fla. 2d DCA 2005) (noting that exceptions to dismissal under Rule 1.420(e) “generally exist when the action is in a state of limbo due to the failure of the court itself to act”).

C. Petitioner's inability to schedule the pending Motion for Reconsideration for hearing, even by telephone, established good cause under Rule 1.420(e).

In any event, the unique facts set forth in the Petitioner's Motion for Reconsideration furnished good cause as to the lack of record activity. Because Petitioner repeatedly informed the trial court that he was unable to schedule the pending Motion for Reconsideration for hearing – and could not appear by telephone without a court order or permission from the Department of Corrections – he showed good cause under Rule 1.420(e) why his action should remain pending.

The *pro se*, incarcerated Petitioner explained his inability to schedule hearings, even telephonic ones, in both his Motion for Reconsideration and in the Answer to the Motion to Dismiss. (App.-B-93-94; App.-D-128-29.) Petitioner accurately summarized Department of Corrections' regulations when he reminded the trial court that he could not call the trial court or opposing counsel to schedule a hearing, nor could he appear by telephone without a court order or authorization from the Department of Corrections. *See* Fla. Admin. Code R. 33-602.205; *see also* § 944.09, Fla. Stat. (2004) (authorizing the Department of Corrections to adopt rules to implement its statutory authority).

Rule 33-602.205 of the Department of Corrections' regulations, for example, authorizes an inmate to make collect telephone calls to his own attorney or to the

individuals listed on his authorized call list, but does not authorize an inmate to telephone opposing counsel or the trial court in a pending civil case. An inmate is allowed to change his call list only once every six months. Fla. Admin. Code R. 33-602.205(2)(c). Aside from an inmate's inability to immediately amend his list, an inmate could not include the names and telephone numbers of opposing counsel or the trial court's chambers in any event. According to Department of Corrections' regulations, an inmate "shall not be allowed to include business telephone numbers" on his call list. *Id.* R. 33-602.205(2)(a). And the Department of Corrections could reasonably deny any request to add a trial court's chambers or courtroom to an inmate's call list as a "threat to institution security or order or to the safety of any person." *Id.* R. 33-602.205(10).⁸

Petitioner once again showed good cause for the lack of record activity. Certainly, if Department of Corrections' regulations did not allow the Petitioner to appear by telephone at an already-scheduled hearing in a civil case – even with a letter from the trial court's staff attorney – Petitioner necessarily could not have called opposing counsel or the trial court's judicial assistant to schedule a pending motion for hearing. (*See* R-I-90; R-I-93; *see also* R-I-126 (requesting that the trial court reschedule the October 18, 2005 telephonic hearing).) And although

⁸ Presumably, this was the basis for the classification officer's denial of the Petitioner's request to participate in the March 31, 2004 telephone hearing. (*See* R-I-90; R-I-93.)

Petitioner could have filed a written request for a hearing on his Motion for Reconsideration (*see* R-I-45),⁹ the record reflects that his request would have been futile: this *pro se*, incarcerated Petitioner likely would have been unable to appear. (*See* R-I-90; R-I-93.)

Thus, the *pro se*, incarcerated Petitioner could not schedule a telephone hearing, much less compel the trial court to decide whether to grant a hearing on the pending Motion. The Fifth District erred in affirming the trial court's dismissal of the Petitioner's action under Rule 1.420(e). Because the Fifth District failed to properly consider whether the pending Motion for Reconsideration provided good cause why there was no record activity during the one-year period, and ignored the undisputed facts of this case, its Opinion must be quashed and the case remanded. Petitioner's pending Motion established good cause under Rule 1.420(e).

⁹ Notably, when Petitioner filed his "Motion for Hearing at Court's Convenience" in October, 2003, he was not incarcerated. (*See* R-I-45.) The trial court did not schedule a hearing on all pending motions until March, 2004 – almost five months later. (*See* R-I-83.) Two days after receiving notice of the scheduled March 31, 2004 hearing, Petitioner promptly advised the trial court that he was temporarily housed with the Department of Corrections at the Central Florida Reception Center and could not attend. (R-I-84.) Petitioner also asked the trial court to hold the entire civil case in abeyance until the resolution of his criminal case or, alternatively, to make arrangements with the Department of Corrections for a telephone hearing. (R-I-84; R-I-85.) The trial court did not respond to either request, but proceeded with the scheduled telephone hearing on March 31, 2004. (*See* App.-A-101-103.)

III. THE TRIAL COURT DEPRIVED THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO ACCESS TO COURTS.

Petitioner is entitled to reversal of the dismissal of his action for yet another reason: the trial court violated the Petitioner's due process rights when it dismissed his civil action without addressing the *pro se*, incarcerated Petitioner's inability to schedule or attend a hearing on his pending Motion for Reconsideration.

Article I, section 21 of the Florida Constitution establishes that the courts will be open and accessible to citizens to address all legitimate grievances. Art. I, § 21, Fla. Const. Section 944.292(2), Florida Statutes, specifically provides that the suspension of a prisoner's civil rights

shall not be construed to deny a convicted felon access to the courts, as guaranteed by s. 21, Art. I of the State Constitution until restoration of his civil rights.

§ 944.292(2), Fla. Stat.

This Court, in *Wilson v. Salamon*, 923 So. 2d 363 (Fla. 2005), noted that the constitutional right to access to courts gives rise to two concerns: first, that cases are resolved on the merits; and second, that “the resolution of cases on the merits is not impaired by the processing of cases without merit or cases that are filed and then abandoned in the system.” *Id.* at 367. Rule 1.420(e) addresses the secondary concern. Although the Rule plays “a useful role . . . in processing cases through the system,” the *Wilson* Court emphasized that “we must never lose sight of our primary policy of fostering resolution of cases on the merits.” *Id.*

Here, the trial court focused solely upon the secondary concern – processing Petitioner’s case through the system – without affording the Petitioner any real opportunity to prosecute his civil action on the merits. The trial court dismissed Petitioner’s action for lack of prosecution without any mention of this *pro se*, incarcerated Petitioner’s inability to schedule a hearing on the pending Motion for Reconsideration. (R-I-131-32.) *Cf. Klaver v. Mander*, 468 So. 2d 261, 261 (Fla. 2d DCA 1985) (finding no violation of an incarcerated plaintiff’s due process rights, for the trial court “recognized plaintiff’s situation” and gave him ample opportunities to file a brief in opposition to the defendant’s motion to dismiss, which the plaintiff in fact filed). For this reason alone, the trial court abused its discretion in dismissing the Petitioner’s action. *See Perez v. Unger*, 571 So. 2d 67, 68 (Fla. 3d DCA 1990) (finding that the trial court abused its discretion “in dismissing the pro se plaintiff’s claim with prejudice for his failure to appear at the calendar call and for trial, in . . . light of the undisputed fact that [the plaintiff] was then an incarcerated state prisoner who was totally unable to attend”); *accord Leone v. Fla. Power Corp.*, 567 So. 2d 992 (Fla. 1st DCA 1990) (reversing order of dismissal and instructing the trial court, on remand, to specifically address the *pro se*, incarcerated claimant’s inability to appear and prosecute his worker’s compensation claim).

Indeed, the trial court dismissed the action – and the Fifth District affirmed its ruling – because Petitioner had not scheduled a hearing on his pending Motion for Reconsideration. By refusing to allow the Petitioner a reasonable opportunity to schedule or attend a hearing on his pending Motion, the trial court deprived the Petitioner of any opportunity to seek meaningful relief in his civil action, which arises from the same alleged criminal conduct for which he was imprisoned. Petitioner asks that the Court quash the Fifth District’s Opinion, and remand this case to allow the Petitioner an opportunity to proceed on the merits of his civil action.

CONCLUSION

For all the foregoing reasons, Petitioner, Daniel R. Erickson, respectfully requests that this Court, in the exercise of its discretionary jurisdiction, quash the Opinion of the Fifth District Court of Appeal, and remand with instructions to reverse the trial court’s dismissal for failure to prosecute under Rule 1.420(e) of the Florida Rules of Civil Procedure.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Loren E. Levy, The Levy Law Firm, 1828 Riggins Lane, Tallahassee, Florida 32308 (Attorneys for Respondents); and John M. Green, Jr., 125 N.E. 1st Ave., Suite 2, Ocala, Florida 34470 (Attorneys for Respondents); by United States Mail, this ____ day of December, 2006.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Attorney