



IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JAMES ROBERT WARD,

Appellant,

v.

Case No. 5D12-49
L.T. No. 2009-CF-13977-O

STATE OF FLORIDA,

Appellee.

_____ /

**RESPONSE IN OPPOSITION TO APPELLEE’S
MOTION TO STRIKE
AND REQUEST FOR EXPEDITED RULING**

Appellant, James Robert Ward, files this Response in Opposition to the State’s Motion to Strike the Initial Brief. As set forth below, the motion should be denied because it is both untimely and without merit. Additionally, Mr. Ward requests expedited ruling on the motion, which has provided the State with a *de facto* extension of time in this long-delayed appeal.

I. Procedural History

1. A brief description of the procedural history of this appeal is necessary to understand the context in which the State’s motion arises.

2. This appeal arises from a jury trial on a single count information charging Mr. Ward with the second degree murder of his wife. Following a trial, Mr. Ward was found guilty as charged, and sentenced to a thirty year term of imprisonment.

3. Ward timely filed his notice of appeal over fourteen months ago, on December 19, 2011.

4. Upon filing the notice of appeal, Ward immediately ordered the appropriate trial and hearing transcripts from the court reporters. Because the court reporters required multiple extensions of time to complete the preparation of the transcripts, Mr. Ward's counsel did not receive the record on appeal until July 19, 2012. Mr. Ward sought and was granted two extensions of time to file his Initial Brief. His Initial Brief was filed on November 2, 2012.

5. The State's Answer Brief was due to be served on December 3, 2012. On the date the Answer Brief was due, December 3, 2012, the State moved for a forty-five day enlargement of time to file "the Answer Brief." Mot. Enlargement of Time (12/03/12), at 1. The extension was granted and the State's time to file its Answer Brief was extended until January 11, 2013. Order (12/19/12).

6. Three days after the State's deadline to file its Answer Brief, on January 14, 2013, the State moved for an additional thirty-five day extension of time "for filing the Answer Brief." Mot. Enlargement of Time (12/03/12), at 1. Mr. Ward

opposed the extension of time. Resp. Opp'n to Appellee's Mot. for Extension of Time (01/14/13). The Court granted the State's motion and ordered that "the time for service of Appellee's Answer Brief is extended up to and including February 18, 2013." Order (02/06/13).

7. After seeking and being granted two extensions of time to file an Answer Brief, the State did not file an Answer Brief. Instead, after business hours on February 18, 2013 – the date the Answer Brief was due – the State electronically served on Mr. Ward a Motion to Strike the Initial Brief.

II. The State's Motion to Strike is untimely.

8. Although the State had more than adequate time before the date the Answer Brief was first due – December 3, 2012 – to review Mr. Ward's Initial Brief, the State did not file a motion to strike at that time. Nor did the State seek an extension of time to file a motion to strike, or notify the Court that the additional time it requested would be used for that purpose. Instead, the State moved on December 3 to extend the time to file an "Answer Brief," then moved again on January 14 for another extension of time to file an "Answer Brief."

9. If the State had notified the Court that the additional time it sought would not be used to prepare an Answer Brief, but that instead on the day the Answer Brief

was due following two extensions of time, the State would file a Motion to Strike, the Court might have considered the State's two extension motions differently.

10. The State has had Mr. Ward's Initial Brief since November 2, 2012, a period of 108 days. Had the State in fact believed that the Statement of Facts in Mr. Ward's Initial Brief was unduly argumentative, it should have moved to strike the brief before its Answer Brief was due, on December 3, 2012. It certainly had more than sufficient time to have filed a motion to strike, had one been appropriate, well in advance of the second extended deadline to file its Answer Brief. The court in *Howard v. Baumer*, 519 So. 2d 679, 681 (Fla. 1st DCA 1988), considered a similarly last-minute motion. The appellee in *Howard* waited until the day before its answer brief was due to file several motions, including a motion to dismiss the appeal on jurisdictional grounds. *Id.* While the court acknowledged that a jurisdictional challenge "may be raised at any time," it commented on "the last minute filing of the motion to dismiss." *Id.* It noted that the appellee had been aware of the issues on appeal for some period of time, yet did not raise the jurisdictional issue until the day before its answer brief was due. *Id.* The court stated that the timing of that motion made "questions regarding the diligence of counsel ... unavoidable." *Id.*

11. Similarly, while no rule sets a deadline for the filing of a motion to strike, the State's motion here was filed over 100 days after the Initial Brief was served.

Such a lack of diligence is inconsistent at the very least with the spirit of the appellate rules. Combined with the facts that the State failed to disclose in its two motions for extensions of time to file an Answer Brief that it would not be filing an Answer Brief but moving to strike, and that the State waited until the day its Answer Brief was due to file the motion, the State's lack of diligence alone is sufficient to warrant denial of the Motion to Strike.

III. Mr. Ward's Statement of Facts is not improperly argumentative.

12. The State's Motion to Strike is not only tardy, but also without merit. The motion rests on the premise that the Statement of Facts contained in Mr. Ward's Initial Brief was improperly argumentative. The State is incorrect.

13. In support of its contention, the State points to certain introductory paragraphs, contending that they are improper because they are argumentative and do not contain citations to the record. Mot. Strike at 1-3. One of the paragraphs the State discusses is the Introduction to the Statement of Facts as a whole and the remaining paragraphs are the introductions to subsections within the Statement of Facts. These introductory paragraphs identify the issues to which the facts discussed are relevant and, in some cases, describe the relevant facts in summary fashion. They are intended to provide guideposts to the reader regarding the sections that follow. Each of these introductory paragraphs is followed by a detailed explanation of the facts regarding

the pertinent issue, with every detailed factual assertion accompanied by a citation to the record.

14. The State also asserts that the Statement of Facts contains “argumentative and inappropriate phrases.” Mot. Strike at 4-8. Mr. Ward submits that the phrases the State objects to are fair characterizations of the record, and are supported by the record. While these statements may be prejudicial to the State, that is not because they are unfairly argumentative, but because an accurate depiction of the events that took place at Mr. Ward’s trial does not reflect well on the State. Notably, while the State complains of many assertions contained in Mr. Ward’s Statement of Facts, it does not, and could not, identify a single assertion that could fairly be characterized as inaccurate or not supported by the record.

15. Moreover, the cases the State cites, Mot. Strike at 8, are inapplicable. The initial brief in *Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829, 830 (Fla. 1st DCA 1989), was “unduly argumentative and contain[ed] matters immaterial and impertinent to the controversy between the parties,” and lacked adequate citations to the record. *Id.* Here, every matter discussed in the Statement of Facts pertains directly to the issues raised in Mr. Ward’s appeal and fairly reflects the record. And while the *Williams* court criticized the appellant there for offering a three-page summary of his trial testimony supported by “[o]ne citation to 66 pages of testimony,”

Mr. Ward's nineteen-page Statement of Facts contains 170 citations to the record – an average of approximately nine citations per page.

16. Similarly, the offending brief in *Sabawi v. Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000), was an answer brief in which the restatement of the case and facts was “unduly argumentative” and contained statements “unsubstantiated by anything in the record.” As discussed above, the assertions the State criticizes here are fair characterizations of the record and are fully supported by detailed explanations of the relevant facts, including citations to the record.

17. For these reasons, the State's Motion to Strike is without merit and should be denied.

IV. Expedited ruling on the State's Motion to Strike is requested.

18. Consideration of Mr. Ward's appeal has already been significantly delayed. As discussed, the court reporters required over six months to prepare the transcripts in this matter. As the State has pointed out, Mr. Ward received extensions of time totaling 75 days to file his Initial Brief; the State has now received extensions totaling 77 days, and has yet to file a brief.

19. Although the State did not file a third motion for extension of time, it effectively granted itself an extension of time by filing the Motion to Strike, due to the tolling provisions of Florida Rule of Appellate Procedure 9.300(b).

20. Mr. Ward is in custody. His appeal has been pending for over fourteen months and is not yet fully briefed. In fairness to him, it is requested that the Court expedite consideration of the State's motion to strike.

21. Further, the Motion to Strike was served on the date the State's Answer Brief was due – indeed, after hours on that date. The State is therefore not entitled to any additional time to file its Answer Brief following the Court's decision on the State's Motion to Strike. Accordingly, it is requested that the Court order the State to file its Answer Brief immediately following the entry of the Court's Order on the State's Motion to Strike.

22. Alternatively, should the Court deem it necessary to take this motion under consideration, it is respectfully requested that the Court nonetheless require the State to immediately file its Answer Brief.

23. Finally, Mr. Ward is filing contemporaneously with this Response his Request for Oral Argument. It is requested that the Court not await further briefing to set Mr. Ward's case for oral argument, or at least that the Court place the case on an oral argument calendar no later than it would have been placed there had the State timely filed its Answer Brief. To do otherwise would further unfairly penalize Mr. Ward for delays that are not of his making.

V. Conclusion

24. For these reasons, Mr. Ward respectfully requests that the Court deny the State's Motion to Strike and order that the State immediately file its Answer Brief.

Respectfully submitted,

/s/ James E. Felman _____

James E. Felman

Florida Bar No. 775568

Katherine Earle Yanes

Florida Bar No. 159727

KYNES, MARKMAN & FELMAN, P.A.

Post Office Box 3396

Tampa, FL 33601

Telephone: (813) 229-1118

Facsimile: (813) 221-6750

Attorneys for Appellant

James Robert Ward

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished by email on this 19th day of
February, 2013, to:

Rebecca Wall
Criminal Appeals Division
Office of the Attorney General
444 Seabreeze Blvd, Suite 500
Daytona Beach, FL 32118
crimappdab@myfloridalegal.com
rebeccawall@myfloridalegal.com

/s/ James E. Felman _____

James E. Felman