

SUPREME COURT OF FLORIDA

CASE NUMBER: 70,910

DEMPSEY J. BARRON,

Petitioner,

v.

FLORIDA FREEDOM NEWSPAPERS,
INC.,

Respondent.

APR 2 1971
CLERK OF THE COURT
By _____
Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

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ISSUE

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE INSTANT CASE WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH *SENTINEL COMMUNICATIONS COMPANY V. SMITH*, 493 So.2d 1048 (FLA. 5TH DCA 1986), *review denied*, 503 So.2d 328 (FLA. 1987).

PRELIMINARY STATEMENT

The petitioner was a respondent and the respondent was the petitioner in the First District Court of Appeal. In the trial court, the respondent was the intervenor and the petitioner was the respondent in a divorce proceeding. In this brief the parties will be referred to as "Dempsey Barron" or "petitioner" and "respondent" or "Florida Freedom Newspapers."

The following symbol will be used:

A

Appendix

STATEMENT OF THE CASE AND FACTS

The petitioner acknowledges that the statement of the facts in a jurisdictional brief are normally to be those facts as found by the lower court. However, since the lower court failed to make any findings or statement of facts, the petitioner submits the following:

On September 9, 1986, the Honorable Don T. Sirmons entered an order sealing the divorce file of the instant petitioner/husband and ordering that further proceedings in the cause were to be conducted in private. (A 1). The order was based on the Fifth District opinion that is in conflict with the instant opinion, *Sentinel Communications Company v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), *review denied*, 503 So.2d 328 (Fla. 1987) and article 1, section 23, of the Constitution of the State of Florida.

On October 1, 1986, Florida Freedom Newspapers, Inc. moved to intervene, and on October 2, 1986, moved to set aside the September 9, 1986, order. (A 2).

After a full hearing on the motion to intervene and motion to set aside, the Honorable Don T. Sirmons entered an order granting the motion to intervene and denying intervenor's motion to set aside order. (A 3). In denying the motion to set aside, the trial court balanced the right of the public to attend the judicial proceeding versus the court's power to protect the individual rights of the parties in a civil proceeding. The trial court recognized that it may exclude the public and press from judicial proceedings to protect the rights of the litigants

only if there are cogent reasons for doing so. The trial court further declared the proper standard to be its discretionary authority under *English v. McCrary*, 348 So.2d 293 (Fla. 1977).

The trial court specifically stated that the instant case was not a case where the court's decision was based solely upon the wishes of the parties to have their dissolution of marriage proceeding conducted in private but, rather, there was a cogent reason that had been presented to the court which was the determinative factor in the court's decision to seal the file and close the hearing.

However, this court finds itself in the further dilemma of if it states the exact reason for closing the file, as requested by the intervenor, then in fact, the court has done away with the reason to keep the file sealed. The court does note for the record that the motion filed requesting closure of the proceedings and sealing the file does state with specificity and supporting documents the information upon which the court closure order is based.

Florida Freedom Newspaper then filed its petition for review of order excluding the press and public from access to judicial records and proceedings on October 29, 1986. Dempsey Barron filed a cross-petition for review of order excluding press and public from access to judicial records and proceedings and granting motion to intervene on November 3, 1986. It must be noted that the final hearing in the divorce was set before the trial court for a November 20th through November 26, 1986. On November 17, 1986, the press filed a motion for emergency stay which was granted without response by the petitioner on November

19, 1986. (A 4).

On February 2, 1987, Mrs. Barron, the petitioner in the dissolution of marriage proceeding, moved to vacate the stay. (A 5).

On March 6, 1987, the First District entered an order affirming the trial court's closing of the proceedings, and stated that an opinion would follow. (A 6). However, on June 1, 1987, seven months after the initial petition had been filed with the court, the First District *sua sponte* reversed itself and held that the public would be permitted access to the court file and the transcript or reporter's notes of any proceedings in the trial court. (A 7).

The petitioner timely filed his notice to invoke discretionary jurisdiction in this court after the First District denied his motion for rehearing.

SUMMARY OF THE ARGUMENT

This Honorable Court should exercise its discretionary jurisdiction granted to it pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), and article V, section 3(b)(3), Florida Constitution (1980). The decision of the First District in the instant case expressly declares that although the court initially decided that *Sentinel Communications Company v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), review denied, 503 So.2d 328 (Fla. 1987), mandated an affirmance of the trial court, upon further review the First District decided that they were "unable to accept the premise of the *Sentinel Communications* decision, and respectfully disagree with our colleagues in the Fifth District." Consequently, the decision of the First District expressly and directly conflicts with a decision of another district court of appeal on the same question of law.

Justice requires and demands that all citizens of Florida have the same rights in domestic relations litigation. The citizens of Florida were given a right to privacy by the Florida Constitution and such right cannot be overcome by an attempt of the press to snoop.

ARGUMENT

This Honorable Court should exercise its discretionary jurisdiction to review the decision rendered by the First District Court of Appeal in the instant case as it expressly and directly conflicts with *Sentinel Communications Company v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), review denied, 503 So.2d 328 So.2d 328 (Fla. 1987).

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and article V, section 3(b)(3), Florida Constitution (1980) declare that this Honorable Court has discretionary jurisdiction to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal on the same question of law. Both the decision of the First District Court of Appeal rendered in the instant case and *Sentinel Communications Company v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), review denied, 503 So.2d 328 (Fla. 1987), deal with the rights of the parties to have the court records in a domestic relations case sealed against the desire of a newspaper to have the court records unsealed and the contents published.

The majority panel in the instant case stated that

[t]he trial judge's initial ruling was based on Article 1, Section 23, Florida Constitution and *Sentinel Communications Co. v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), review denied, 503 So.2d 328 (Fla. 1987).Our initial consideration of the closure order attempted to conform our holding to that of our sister court; however, upon further review, we are unable to accepted the premise of the *Sentinel Communications* decision, and respectfully disagree with our colleagues in the Fifth District. The decision in *Sentinel Communications* assumes there is a 'private civil litigation.' Because we cannot agree with this premise, we cannot accept the rationale of our colleagues.

12 FLW 1365.

The petitioner respectfully submits that this court, consequently, has discretionary jurisdiction based on the decision of the First District as it expressly and directly conflicts with the Fifth District's decision in *Sentinel Communications*.

The First District declared that "[t]here is no private litigation in the courts of Florida." The Fifth District, on the other hand, held that:

The fact that the husband-father in the domestic relations case was, and is, a judge does not distinguish this case from all other similar cases. People get married and divorced, not as judges, doctors, lawyers, editors, preachers, policemen, plumbers, plasterers, or painters, but as natural human beings just as all other citizens. The husband-father and the wife-mother and their children in this case have, and should have, the same rights in domestic relations litigation as every other citizen -- no more, no less. If the privacy rights of the litigants and third persons in this case are not recognized and respected, then no citizen has any right of privacy in private litigation.

493 So.2d at 1049. (emphasis added). The court footnoted to the fact that the United States has long recognized that several of the fundamental constitutional guarantees have created a penumbral right to privacy that is no less important than the rights expressly specified in the Constitution. The court then cited to *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) and article I, section 23, Florida Constitution. There can be no questions then but that the instant decision conflicts with the decision of the Fifth District on the same

question of law. *Mancini v. State*, 312 So.2d 732 (Fla. 1975).

The decision of the First District also conflicts the Fifth District as to the standard of review in such cases. The Fifth District correctly declared the standard to be on the newspaper to demonstrate that the trial judge has abused his discretion. *Sentinel Communications Company v. Smith, supra*, 493 So.2d at 1049. In the instant case, however, the First District substituted its judgment for that of the trial court, did an independent review, and found that the reason not to be sufficiently compelling to justify closing the proceedings. The trial court in the instant case had found a "cogent reason to seal the file and close the proceedings." The First District did not discuss, much less apply, the correct standard of review, i.e., whether or not the trial court abused its discretion.

The decisions also conflict as to a third question of law and that is which test is to be applied when making the decision whether to seal or unseal a court file. The Fifth District correctly ruled that it is a balancing test, balancing the rights and interests of the parties to litigations with those of the public and press. This Honorable Court held that to be the test in *State ex rel. Miami Herald Publishing Company v. McIntosh*, 340 So.2d 904 (Fla. 1977).

The First District, on the other hand, incorrectly held that the three-pronged test for criminal cases set forth in *Miami Herald Publishing Company v. State*, 363 So.2d 603 (Fla. 4th DCA 1978) should be applied in civil cases. Since the public and, therefore,

the press, does not have a first amendment right to civil proceedings, only a common law right, *Sentinel Communications Company v. Smith, supra*, 493 So.2d at 1051 (*Sharpe J., dissenting*), the three-pronged test for criminal cases is inapplicable.

The primary purpose of article V, section 3(b)(3), Florida Constitution is to avoid confusion and to maintain uniformity in the case law of Florida. *Tyus v. Apalachicola Northern Railroad Company*, 130 So.2d 580 (Fla. 1961). Uncertainty now prevails in Florida due to the conflicting decisions developed by the First District's opinion. Therefore, the petitioner respectfully submits that it is essential for this Honorable Court to accept discretionary jurisdiction of the cause in order to rectify the conflict and remedy the uncertainty.

CONCLUSION

The petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and accept the instant case in order to remedy the conflict between the instant decision and the decision of the Fifth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
was furnished to:

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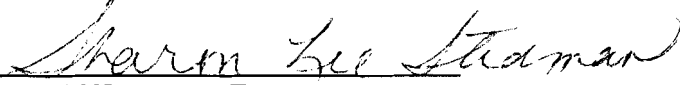
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