IN THE SUPREME COURT OF THE STATE OF FLORIDA

PETER RICHARD KOSHEL)
)
Petitioner,)
)
vs.) DCA CASE NO. 93-1966
)
STATE OF FLORIDA,) Supreme Court Case No. 83,765
)
Respondent.)
)

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In June of 1993, the defendant[1] was charged with two counts of aggravated stalking. One count alleged a violation of subsection (3) of the Florida Stalking Law (a credible threat in conjunction with following or harassment); and one count alleged a violation of subsection (4) of the law (following or harassment after an injunction). Both were third-degree felonies. (R 1, 21, 34)

The defense moved to dismiss on the ground that the Florida Stalking law is facially unconstitutional due to vagueness and overbreadth. (R 29-32)

Both sides submitted memoranda of law in support of their positions, (R 41-52, 53-58), and the matter was heard by the trial court on July 16, 1993. (TR 1-64) The court's ruling was

[1] Documents filed with the clerk of the trial court are cited as: (R). Cites to court proceedings are cited as: (TR) The defendant at the trial level, now the petitioner will be referred to as the defendant. The state, now the respondent, will be referred to as the state. In addition to its numerical designation, Section 784.048, Florida Statutes is sometimes referred to in the brief as the Florida Stalking Law.

contained in a six-page order outlining the facts of the case and the applicable law. The order concluded by finding the Florida Stalking Law unconstitutionally vague due to the subjective standard contained in the definition of "Harasses" used therein, and granted the motion to dismiss. (R 59-65) A copy of this order is attached hereto as Appendix B

The state appealed the order of dismissal, (R 67), and the Fifth District Court of Appeal reversed the decision of the trial court based on the recent decision of Bouters v. State, 634 So.2d 246 (5th DCA 1994) (Appendix A)

The defendant filed a Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court, citing as grounds that the decision of the 5th DCA reversing the trial court in this case was based on and therefore paired with the decision of the 5th DCA in Bouters, id., in which the Fifth District Court of Appeal expressly declared a state statute valid.

Briefs on the issue of jurisdiction were filed by both the defendant and the state, and on July 11, 1994, the Florida Supreme Court issued its order accepting jurisdiction, dispensing with oral argument, and directing that petitioner's brief on the merits should be filed on or before August 5, 1994.

These proceedings follow.

SUMMARY OF ARGUMENT

The language of Section 784.048, Florida Statutes, is vague and overbroad, and does not give people of ordinary intelligence fair notice of what constitutes forbidden conduct under its terms. Because of its vagueness, the law is subject to arbitrary and discriminatory enforcement.

The Florida Stalking Law is also overbroad in that the offense is defined in such imprecise terms that it covers speech and expressive conduct protected by the First Amendment to the federal Constitution, and by Florida's Declaration of Rights. The statute, if enforced, will deter the public's exercise of the right of free speech.

ARGUMENT

THE FLORIDA STALKING LAW IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

As Judge Lockett correctly ruled below, the aggravated stalking statute is unconstitutionally vague and overbroad on its face. Enforcement of the statute would violate the defendant's right to due process of law, and would chill the public's right of freedom of expression. U.S. Const., Amends. I, V, XIV; Art. I, Fla. Const., sections 4, and 9.

Section 784.048, Florida Statutes (1992 supp.) creates the misdemeanor of stalking and the felony of aggravated stalking. The misdemeanor of stalking is committed either by willful, malicious, repeated following or by willful, malicious, repeated harassment. Section 784.048(2), Florida Statutes. Harassment is defined in Section 784.048(1), Florida Statutes; malicious following is not defined.[2] The felony of aggravated stalking consists of misdemeanor stalking combined with either a credible threat against the person stalked or with violation of an injunction against domestic violence. Sections 784.048(3), (4), Florida Statutes. Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has committed either misdemeanor or aggravated stalking. Section 784.048(5).

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[2]A copy of Section 784.048 is attached to this brief as Appendix C.

I. Vagueness.

The felony of aggravated stalking requires the state to prove, as an essential element, either that the defendant willfully and maliciously harassed another or that he willfully and maliciously followed another. Section 784.048(3), (4), Florida Statutes (1992 supp.)

The term harass does not give potential offenders notice as to what acts are criminal, and lends itself to arbitrary and selective enforcement.

Harassment, as defined in the stalking statute, consists of

a) a course of conduct (defined as a series of acts)

b) directed at a specific person

c) that causes substantial emotional distress in such person

d) and serves no legitimate purpose.

The statute further recites that "[c]onstitutionally protected activity is not included within the meaning" of harassment. Section 784.048(1) (b), Florida Statutes.
See: Section 784.048(1), Florida Statutes (1992 supp.) (Appendix C to this brief).

(1) "No legitimate purpose."

The Statute defines harassment as conduct distressing to another which has no legitimate purpose. Therefore, how an officer interprets the word legitimate is absolutely determinative of whether an accused will be chargeable with a crime under the Florida Stalking Law. A police officer who is dispatched to the scene of what may be a stalking violation must first make a

determination of whether the conduct before him is serving a legitimate purpose. If the officer arrives at the scene and finds bill-collecting, mortgage-foreclosure, investigative reporting or abortion-picketing in progress, he is likely to decide that the malicious harassment taking place is serving a legitimate purpose, and that no crime is being committed no matter how much malice may be in the air or how much anguish the behavior may be causing. In such circumstances he will no doubt recognize that his duty under this law is to leave the parties as they are and go back on patrol.

Thus, the question of whether further investigation will even be undertaken depends on the subjective determination of the responding officer as to whether or not the course of conduct being questioned is serving a legitimate purpose. But the statute does not define "legitimate". The officer is on his own in this regard. He must make the watershed decision as to whether the behavior before him is legitimate without guidance of any kind from the statute.

It might be argued that the term legitimate has been in the english language for hundreds of years and everyone should by now have a good grasp of its meaning. The problem with this reasoning is that the issue of legitimacy or illegitimacy of behavior is the absolutely pivotal point upon which all ethical systems are based.

Legitimate and illegitimate are simply two other words for right and wrong, or good and evil. Sending an officer out

without very specific guidelines to arbitrate legitimate behavior in the abstract is like sending him out, as in Camelot, to fight for right.

People of different backgrounds commonly differ as to what they consider legitimate, right and good. Some might consider harassment pursuant to investigative reporting legitimate, while others might not. True, such reporting is frequently malicious, but many can accept malice as justified if the perceived turpitude of the subject being investigated is great enough.

An examination of the statute reveals that, having set loose the issues of legitimacy and illegitimacy, it contains nothing to guide or help the officer in resolving what amounts to the age-old struggle between good and evil. No specific definitions have been provided, no guidelines have been set forth, and no ethical principles have been enunciated.

Hence the defendant argues that, without specific guidelines, various enforcers from different cultural backgrounds will differ as to the application of this statute. In Florida we have many cultural backgrounds. A court could probably take judicial notice of the fact that the state of Florida is a melting pot of divers cultures.[3]

This possibility of divers application because of divers

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[3]Perhaps such a law would work well in an island society such as Japan in which a single homogenous culture thousands of years old still exists. In Japan there may actually be some surviving consensus as to fundamental cultural values which could support sending the police out without guidelines to support what they thought was legitimate and suppress that which they thought was illegitimate.

cultural backgrounds is good evidence that the law is unconstitutional, because the U.S. Supreme Court has held that a statute is unconstitutionally vague if it is so drafted that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Company, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926)

With these considerations in mind, it seems clear that the use of the term legitimate without specific definition or guidance as to its meaning "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-9, 92 S.Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972), quoted in Wyche v. State, 619 So. 2d 231, 236-7 (Fla. 1993).

2. "Substantial emotional distress."

The definition of "harassment" contains a second element of troublesome vagueness: "substantial emotional distress"

A penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to apprise ordinary persons of common intelligence what conduct will render them liable to be prosecuted for its violation. Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991). In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance. Id.; State v. Llopis, 257 So. 2d 17, 18 (Fla. 1971); Locklin v. Pridgeon, 30 So. 2d 102,

104 (Fla. 1947). The use of the term "substantial" in a penal statute runs counter to this requirement of statutory definiteness because it adds a second tier of imponderables to the charging decision that an officer at the scene of an alleged stalking must make. If the officer has confronted the question of whether, in his estimation, the activity being engaged in is serving a legitimate purpose, and has decided that it is not, he must enquire further: he must determine if the course of conduct in the situation is causing "substantial emotional distress" in a specific person. The statute, however, provides no guidance as to how to diagnose this condition.

Although polygraph and psychological stress evaluation machines exist, they are not yet considered reliable enough for general admissibility in judicial proceedings. Cohen V. State, 581 So.2d 926 (3rd DCA 1991); Davis v. State, 520 So.2d 572 (Fla.1988); Delap v. State, 440 So.2d 1242 (Fla.1983) Certainly, this equipment is not available at the street level to help a police officer in making a good on-the-spot determination of the degree of emotional distress in someone he is facing on a front porch. The use of this equipment is not even addressed in the statute. Hence the officer must determine the level of emotional distress in a stranger, and he must do it based on nothing more than his own subjective appreciation of the symptoms being exhibited by the person before him. His difficulty in this regard will be compounded by the fact that no guidance is given by the statute as to the meaning of the term "substantial",

which, depending on the criteria used, could mean anything from noticeable annoyance to a state of stunned, catatonic horror. It can be accepted that even trained psychologists are frequently guessing when they assess a person's level of emotional distress without the use of written tests or special equipment. It is safe to assume that a police officer will be in no better position on the street than a psychologist would be in his office. Hence it is also safe to assume that the police officer will be guessing at the level of emotional distress a large proportion of the time.

Given this built-in component of uncertainty, generated in part by the absence of guidance in the statute, different police officers, having different upbringings, and different educations, equipped with no special equipment, and being without specific guidance, will necessarily differ as to whether the level of stress required for activation of the statute has been reached.

This is more good evidence that the statute is unconstitutional under the reasoning of The Supreme Court in Connally, id. The police, being usually "men of common intelligence", must necessarily "guess at the meaning" of the phrase "substantial emotional distress", and "differ as to its application". The statute has thus "left to police the unguided task of differentiating between constitutionally protected street encounters and acts reflecting the state of mind needed to make an arrest.", a situation the Florida Supreme Court viewed with disfavor in Wyche v. State, 619 So.2d 231 (Fla. 1993)

The above analysis was undertaken from the standpoint of the officer or other official trying to enforce the statute. The Statute is also lacking when viewed from the perspective of the potential violator perusing the statute before going forth to unravel a ticklish personal situation: The statute says that "harasses" means to engage in a course of conduct that causes "substantial emotional distress". Clearly from this the reader is entitled to conclude that it is generally legal to cause emotional distress, but doing so can become illegal depending on whether the emotional distress reaches the level of being "substantial". No guidance is given to potential offenders as to when the line between insubstantial and substantial is likely to be crossed. Since felony sanctions may be riding on this semantic point, fairness to those governed requires true clarity. No level of fuzziness is really acceptable. State v. Llopis, 257 So. 2d 17, 18 (Fla. 1971); Locklin v. Pridgeon, 30 So. 2d 102, 104 (Fla. 1947). Rather than being explicit, however, the statute is worded so that the critical point at which substantial (and therefore criminal) distress is reached is left to the subjective judgement of the beholder. This looks suspiciously like a "subjective analysis which is likely to differ from person to person", as condemned in Cuda, infra. It is also a wording which: "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." as was justly criticized in Grayned v. City of

Rockford, 408 U.S. 104, 108-9, 92 S.Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972), quoted in Wyche v. State, 619 So. 2d 231, 236-7 (Fla. 1993).

The use of the word substantial has created within the statute a broad, subjective, no-man's land of interpretation in which semanticists may argue about nuance and degree while those less sophisticated are taken off to jail. The definition of harassment in the stalking statute, like the ordinance at issue in Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L. Ed. 2d 214 (1971), approaches the point at which it is "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." The Cincinnati ordinance involved in Coates made it a crime for "three or more persons to assemble...and...conduct themselves in a manner annoying to persons passing by." Id. at n.1. The Court held that:

> [t]he city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment of ordinances directed with reasonable specificity toward the conduct to be prohibited. It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.
>
> Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L. Ed. 2d 214

(1971) at 614 (cites and internal punctuation omitted)

The Florida Stalking Law is a Penal statute and a new extension of state power. Both the officials who must enforce the new Law and the citizens who must be governed by it require and deserve a high level of certainty as to its meaning. The use of a subjective term such as "substantial" at a critical point in the law prevents the requisite level of certainty, and renders the law constitutionally repugnant in its present form.

3. The law keys prosecution to emotional response.

There is another troublesome aspect to this law. It is the decision of the legislature to tie criminality to the emotional state of the accuser. This step creates the spectre of what Judge Lockett referred to in his cogent order as the "subjective victim", or the "eggshell victim":

> It is argued that the definition of the term "harasses" found in section (1)(a) of 784.048 Fla. Statute is facially vague and over-broad and that since this term is incorporated in both sections (3) and (4), which defendant is charged with violating, the Second Amendment, Information should be dismissed.
>
> The defendant asserts that this definition invokes a concept of the "subjective victim" which is abhorrant to our jurisprudence of criminal law. We are told that to prohibit by criminal sanctions conduct directed at a specific person "that causes substantial emotional distress <u>in such person</u> (emphasis supplied) and serves no legitimate purpose" is tantamount to introducing the concept of the "eggshell victim" from tort law into the criminal law as the concept of the "eggshell victim." Judge Lockett's order at (R 60)

Traditionally, laws have been tied to the stimulus side of the interpersonal equation. If a man did something specific, a corresponding emotional response was assumed to result in the

victim. It was the stimulus, which the defendant controlled, which was used as the determinant of criminality. The law, in short, regulated behavior and assumed emotional response.

This law reverses that. Now the emotional response is what controls criminality. This is, of course, beyond the control of the accused.

The law is now monitoring emotional response and assuming that if the response was bad, the stimulus behavior which elicited it must have been criminal. On close examination, it will be apparent that this is a fallacy. Where emotions are concerned, the pathology of the person having the emotion can be a bigger determinant of the emotion than the objective stimulus. There are people who have free-floating anxiety which has no discernible stimulus whatever. Such people, eggshell victims as it were, are balanced on an emotional knife edge, subject to being tipped by any passing stimulous.

If the person who calls the police is a hysteric, the emotional distress may be extreme, but the stimulus which produced it may have been some minor transgression hardly noticeable to a normally-balanced personality.

How can a man justly be held criminally responsible for that which is beyond his control?

What is happening here is that the statute departs from prohibition of objectively harmful behavior and expands the area of onus to include offensiveness, and it does this without specifying in any clear manner what is offensive. The law has

now broken into the area of criminalizing manners.

Speech is a form of behavior which might be particularly vulnerable to hypersensitivity of the type being considered. The "chilling effect" on first-amendment freedoms has been cited as a compelling reason why vague and overbroad laws should not be upheld. Wyche, Id.; City of Daytona Beach v. Del Percio, 476 So.2d 197, 202 (Fla.1985). After arrest and prosecution, the rude or annoying person might be exonerated, but she would be unlikely to revisit that topic again in conversation with the accuser. The fact that a person is later vindicated by a court is of little consequence since it is the arrest itself that chills First-Amendment rights. Coleman v. City of Richmond 374 S.E. 2d 239 (Va. Ct. App. 1988)

Clearly there is a conceptual problem with this statute which must be set right before the courts consent to enforce it.

II. Overbreadth

The danger of an overbroad statute is that constitutionally-protected forms of activity stand to be curtailed. In the case of this statute, with the applicability of the law anchored in the subjective response of the accuser and individual beliefs of the responding officer, an arrest might ensue in almost any emotionally-charged activity, regardless of its constitutional sanctity if, (a) the complainant and the police officer could agree that it was serving no legitimate purpose and, (b) the person who called the police found it upsetting and exhibited behavior which the officer was willing to accept as evidence of

substantial emotional distress.

If only socially-destructive behavior was capable of upsetting people, this would be an acceptable state of affairs. However, some forms of constitutionally protected behavior, such as political protest and investigative reporting, are upsetting to those involved, and many of them are necessarily and properly conducted with malice and rancor. These activities well fulfill the "willfully and maliciously" criteria of the statute, while still being constitutionally protected.

The statute does, by its terms, exclude constitutionally protected activities from criminality. This is nugatory language, since it is beyond the legal power of the Florida legislature to take away constitutionally protected freedoms in any event. The fact that the legislature even felt compelled to include such a curious paragraph in its law seems to indicate a consciousness that constitutional problems may ensue.

With the statute drafted as it is, the possibility of transgression on constitutionally protected ground is real, disclaimer clauses notwithstanding. For example: Depending on the subjective beliefs of the legal authority at the scene, a snooping investigative reporter might well be taken in. A determined abortion protestor, no longer part of an organized protest, since all her cohorts had given up and gone home, might go to jail. Yet constitutional scholars might later find that either of these incarcerated zealots was exercising constitutionally-protected first-amendment freedoms.

It is not enough to put a man through the police academy and then send him out to unravel problems which might confound a constitutional scholar without even defining the terms in the statute he is to enforce. Specific guidance contained in the law itself is needed. When a policeman faces a trembling protestor on a first-amendment battleground, it will be of little use to him that the legislature has included the blithe caveat: "Constitutionally protected activity is not included".

This lack of definiteness not only allows, but practically assures, arbitrary and discriminatory law enforcement in contravention of Kolander v. Lawson, 461 U.S. 352 (1983). Regardless of his good will to do only that which is legitimate and constitutional, an officer who has only his subjective appreciation of terms like "legitimate", "substantial" and "Constitutionally protected" as his sheet anchors when making decisions is simply underequipped for his job. To do his job under this law he must make decisions as to who shall be charged with a crime and who shall not. When sent to a scene he will do his duty and bravely make these decisions, but without specific guidance as to the exact meaning of the statute, he can hardly be expected to avoid arbitrary and discriminatory enforcement of the law.

A subjective standard has been created by the undefined and subjective wording of the statute itself. An unenforceably vague law has resulted. It becomes impossible to predict from one officer to the next and one victim to the next what conduct will

be "legitimate", what distress will be "substantial", and what activities will be "constitutionally protected".

Hence, by failing to provide clear guidance as to what is meant by the terms harassment, substantial, and constitutionally-protected in the stalking statute, the legislature "delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis," Grayned, supra, and should not be enforced for that reason.

Even if this court holds that the statute is not unenforceably vague, it should still invalidate the statute for overbreadth. Speech is constitutionally protected against censorship or punishment unless it is shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. Houston v. Hill, 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

The stalking statute is not narrowly tailored to safeguard free speech. It clearly has the potential for curtailing constitutionally-protected speech, and it should not be enforced.

The definition of "harassment" in the stalking statute is overbroad; the order appealed from should be affirmed.

CONCLUSION

Based upon the precedents and arguments set out above, the defendant requests that this court reverse the decision of the 5th District Court of appeal herein and re-affirm the decision of the trial court by finding the Florida Stalking Law facially invalid as being unconstitutionally vague and overbroad.

Respectfully submitted,
JAMES B. GIBSON
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served by mail on Michael Niemand, counsel for the State, at the Office of the Attorney General, Post Office Box 13241, Miami, Florida 33101; and mailed to Peter Richard Koshel at 849 Turtle Mound Drive, Casselberry, Florida 32707, this 2nd day of August, 1994.

S.C. VAN VOORHEES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

PETER R. KOSHEL, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	S.Ct. CASE NO. 83,765

A P P E N D I X

APPENDIX A

Bouters v. State, 634 So.2d 246 (5th DCA 1994)

Scott BOUTERS, Appellant,
v.
STATE of Florida, Appellee.

No. 93-504.
District Court of Appeal of Florida,
Fifth District.

March 25, 1994.

Defendant was charged with offense of aggravated stalking. Defendant moved to dismiss on ground statute was unconstitutional. The Circuit Court, Orange County, Richard F. Conrad, J., denied motion and appeal was taken. The District Court of Appeal held that: (1) statute was not facially vague or overbroad, and (2) assuming that word "harasses" as used in statute is vague, statute in its entirety rendered that particular phrase superfluous and hence harmless.

Affirmed.

EXTORTION AND THREATS k25.1
165 ----
165II Threats
165k25 Nature and Elements of Offenses
165k25.1 In general.
Fla.App. 5 Dist. 1994.
Antistalking statute was constitutional, even though it contained definition of term "harasses" which was allegedly vague and served no legitimate purpose; statute, read in its entirety, rendered phrase in question superfluous, and hence harmless. West's F.S.A. Sec. 784.048(1)(a), (3).

James B. Gibson, Public Defender, and S.C. Van Voorhees, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Michael J. Neimand, Asst. Atty. Gen., Parker D. Thomson, and Carol A. Licko, Sp. Asst. Attys. Gen., Miami, for appellee.

PER CURIAM.

The appellant, Scott Bouters, was charged with the offense of aggravated stalking pursuant to section 784.048(3), Florida Statutes (Supp.1992), known as the Florida Stalking Law. He moved to dismiss on the ground that such statute is facially unconstitutional because of vagueness and overbreadth. Following denial of that motion, he pled nolo contendere and then filed the instant appeal. Without belaboring the issue, we find the aforesaid statute to be facially constitutional, and basically agree with the analysis of that statute as found in State v. Pallas, 1 Fla.L.Weekly Supp. 442 (Fla. 11th Cir. June 9, 1993). In respect to the argument that the definition of the word "harasses" in subsection (1)(a) of the statute is vague because of the nonspecific term "serves no legitimate purpose," we agree with the analysis in State v. Bossie, 1 Fla.L.Weekly Supp. 465, 466 (Fla. Brevard County Ct. June 22, 1993), that the statute, read in its entirety, renders that particular phrase superfluous, hence, harmless.

AFFIRMED.

DAUKSCH, COBB and GRIFFIN, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, FLORIDA

CASE NO. 93-428-CF-JL

STATE OF FLORIDA,

vs.

PETER RICHARD KOSHEL,

Defendant.

_____/

AUG 2 4 52 PM '93

ORDER

This matter presents for consideration an alleged tension between the First Amendment to the United States Constitution and Florida Statute 784.048, the anti-stalking statute.[1]

FACTS

A sparse record indeed is presented for review herein. Sworn testimony was taken during a hearing on the States' Motion To Revoke Bond and a Traverse and Demurrer has been filed. Defendant is charged with violation of both sections (3) and (4) of Florida Statute 784.048 and is free on bond. It appears that there exists a business and personal dispute between defendant and the victim. Defendant contends his contacts with

[1] This court is aware of the doctrine that courts should avoid holding a statute unconstitutional if a fair construction of the legislation will allow, and that this duty extends to avoid ruling that a statute is unconstitutional if the case can be resolved in another matter. State v. Williams, 584 So.2d 1119 (Fla. 5th DCA 1991). This court denied defendant's Fla. R. Crim. P. 3.190(c)(4) motion based upon the Traverse and Demurrer filed by the State. Nevertheless, the term "harasses" alleged to be unconstitutional is found in both Counts I and II of the Second Amended Information and must be addressed herein. c.f. f.n.3.

the victim, both before and after the various injunctions entered in the companion civil case #93-578-CA-01, have been strictly of a business nature. The victim and law enforcement maintain the defendant has harassed and threatened the victim, stating he will "love her to death", "waste" her, and that "she will get what she deserves." There is no evidence that defendant has "followed" the victim, but rather all allegations of statutory violation involve alleged spoken threats.

LAW

Defendant launches several attacks upon Florida Statute 784.048. Only one deserves discussion. It is argued that the definition of the term "Harasses" found in section (1)(a) of 784.048 Fla. Statute is facially vague and over-broad and that since this term is incorporated in both sections (3) and (4), which defendant is charged with violating, the Second Amended Information should be dismissed.

The defendant asserts that this definition invokes a concept of the "subjective victim" which is abhorrent to our jurisprudence of criminal law. We are told that to prohibit by criminal sanctions conduct directed at a specific person "that causes substantial emotional distress in such person (emphasis supplied) and serves no legitimate purpose" is tantamount to introducing the concept of the "eggshell plaintiff" from tort law into the criminal law as the concept of the "eggshell victim." A constitutional analysis ensues.

In McKenney v. State, 388 So.2d 1232 (Fla. 1980) there is found a three-fold analysis for use in examining a vagueness

and over-breadth challenge to a criminal statute:

1. The statute cannot infringe upon constitutionally protected First Amendment freedoms of expression and association;

2. The statute must be phrased so that persons of common intelligence have adequate notice as to the nature of the proscribed conduct, and;

3. The statute may not be worded so loosely that it leads to arbitrary and selective enforcement by vesting undue discretion as to its scope in those who prosecute.

The State attempts to defend the statute on several grounds. First, it maintains the eggshell victim is not new to the criminal law and directs us to the "assault" statutes. However, a careful reading of the "assault" definition in the statutes and the jury instructions reveals otherwise.

Secondly, the State maintains that the language "willfully, maliciously, and repeatedly" which precedes "harasses" in both sections 784.084(3) and 784.084(4) of the statute somehow cures the vagueness. This is simply without merit.

Next, it is argued that since the language "... and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury"[2] in section 784.084(3) is joined with "harasses" this cures the vagueness defect. However, this language is not a modifier or a further definition of "harasses", but defines <u>additional</u> activity required to be

[2] Here, interestingly, we find the <u>objective</u> standard of the criminal law: in "<u>reasonable</u> fear."

proved. [3]

Finally, the nub of the State's position is reached as it examines the void for vagueness test as applied. The resolution of the issue presented is dependent upon the method of constitutional analysis applied.

The defendant argues that the analysis involves a straight one, two, three application of the McKenney, supra, analysis. That is, a facial attack on the statute as void for vagueness is permitted if the statute infringes upon protected First Amendment freedom of expression. Then the language of the statute itself, without regard to the defendant's actual conduct or speech, is examined with regard to prongs two and three of the analysis.

The State seems to urge that the Court should examine the defendant's actual conduct or speech before analyzing other hypothetical applications of the law, citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed 2d 362 (1981). However, Hoffman instructs otherwise. 71 L.Ed 2d at 369. The first task is to determine whether the enactment (statute) reaches a substantial amount

[3] It is noted that in both sections the language "follows or harasses" is used. In a proper case a charge of "follows" etc. coupled with the "credible threat" language could save section 784.084(3). Query the result as to section 784.084(4) where this language is not found. Since there is no factual allegation in this case that the defendant has "followed" the victim, the doctrine of "severability" announced in Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828, 830 (Fla. 1962) has been applied in the result herein. c.f. State v. Cuda, 18 F.L.W. D 1612 (Fla. 5th DCA 1993) for an enlightening discussion by Judge Peterson of this issue in a similar context.

of constitutionally protected conduct. Certainly that test is met in this case. At stake is defendant's fundamental freedom of expression, which he maintains involves business dealings and personal conversation. Any speech, no matter how innocuous, may cause distress in the hypersensitive victim embodied in the statute's subjective personae.

If the answer to the above question is "no" [4] then, and only then, do we examine defendant's statements in this particular case. We do not reach this point in this analysis.

It is clear that on its face a portion of Florida Statute 784.048 is unconstitutionally vague. The subjective standard contained in the definition of "Harasses" is impermissibly vague. [5] No citizen of this state should be required to comport his or her conduct or speech to the "hypersensitive victim." No person of common intelligence can know when this victim may be encountered. No law enforcement agent will feel bound in any given case by any standard of victim sensitivity.

Parenthetically, it should be noted that this court is well aware of the very real societal problem involved in the stalking scenario. Death may result; lives may be ruined. Not only women may be victims. Male teachers, and judges, and others, may be

[4] That is: Does this statute infringe upon protected First Amendment freedom of expression?

[5] The attempt to save the statute by insertion of the language "and serves no legitimate purpose" in section (1)(a) fails. K.L.J. v. State, 581 So.2d 920 (Fla. 1st DCA 1991). Can harassment ever serve a legitimate purpose, as one understands the common meaning of the term?

victims. The solution to a social problem is not overreaction by unconstitutional legislation. The simple solution to this legislative creation, in this court's opinion, is to remove the subjective test of emotional distress from the "Harasses" definition and to insert the objective test of the reasonable person which the criminal law has asked juries to apply for over one hundred years.

Defendant's Motion to Dismiss is granted and Counts I and II of the Second Amended Information, as to the allegations of "or harass", are dismissed.[6]

DONE AND ORDERED in Chambers at Tavares, Lake County, Florida, this 2nd day of August, 1993.

Jerry T. Lockett

JERRY T. LOCKETT, Circuit Judge

[6] It is to be noted that this decision does not leave the victim in this case unprotected. She has in full force and effect an Injunction for Protection which, if it has been or may be violated, can be enforced by the contempt power of the issuing court. The defendant can be sentenced to six (6) months in jail for each violation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by Hand Delivery this 2nd day of August, 1993 to DIANE DIPIETRO, Assistant State Attorney and WILLIAM H. STONE, Assistant Public Defender.

Robin R. Manchester
Judicial Assistant

784.048. Stalking; definitions; penalties

(1) As used in this section:

(a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

(b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

(c) "Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.

(2) Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who, after an injunction for protection against repeat violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section.

APPENDIX D

93-777 UR

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE OF FLORIDA,

Appellant,

v. CASE NO.: 93-1966

PETER RICHARD KOSHEL,

Appellee.

Opinion filed May 20, 1994

Appeal from the Circuit Court
for Lake County,
Jerry T. Lockett, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, Michael J. Niemand, Assistant Attorney General, and Parker D. Thomson and Carol A. Licko, Special Assistant Attorneys General, Miami, for Appellant.

James B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellee.

PER CURIAM.

REVERSED. See Bouters v. State, 19 Fla. L. Weekly D678 (Fla. 5th DCA March 25, 1994).

COBB, SHARP, W. and THOMPSON, JJ., concur.