IN THE SUPREME COURT OF FLORIDA

ROGER ANTHONY DANIELS, MARK GIBSON, and JOHN ROGERS,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

S.CT. CASE NO. 83982

DCA CASES NO. 93-1723
93-1724
93-1725
(CONSOLIDATED)

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

S.C. VANVOORHEES
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0109503
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Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONERS

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STATEMENT OF THE CASE AND FACTS

Each of the three petitioners was charged in Seminole County with the misdemeanor of stalking, pursuant to Section 784.048, Florida Statutes. (R 5, no. 93-1723; R 12, no. 93-1724; R 3, no. 93-1725) The Honorable Frederick Hitt, County Judge, dismissed the information filed in each case, based on his ruling that the terms "substantial emotional distress," "no legitimate purpose" and "constitutionally protected activity" in the stalking statute are unconstitutionally vague. (R 17-23, no. 93-1723; R 33-39, no. 93-1724; R 11-17, no. 93-1725) The State appealed the three dismissal orders. (R 25, no. 93-1723; R 41, no. 93-1724; R 19, no. 93-1725) The Fifth District Court of Appeal consolidated the appeals by its order dated December 20, 1993.

The District Court of Appeal reversed the dismissal orders by its decision dated May 27, 1994. (See appendix to this brief) The appellee/petitioners timely moved for rehearing on Monday, June 13, 1994, and the motion was denied on June 30, 1994. (See appendix) The petitioners filed their notice to invoke the jurisdiction of this court in the District Court of Appeal on July 5, 1994.

SUMMARY OF ARGUMENT

The district court's opinion paired these cases for review with its earlier decision in Bouters v. State, 19 Fla. L. Weekly D678 (Fla. 5th DCA March 25, 1994), jurisdiction accepted no. 83,558 (Fla. June 21, 1994). In both Bouters and these cases the Fifth District Court held that the stalking statute is not unconstitutionally vague. The petitioners submit that the statute should be held void for vagueness and overbreadth, and that it violates substantive due process in that it sweeps plainly innocent conduct protected by the First Amendment within its broad prohibition. The petitioners request this court to exercise its discretionary jurisdiction and to review the Fifth District Court's decision in these cases.

ARGUMENT

THE DISTRICT COURT'S DECISION IN THESE CONSOLIDATED CASES IS PAIRED FOR REVIEW WITH A DECISION THAT EXPRESSLY DECLARES A STATE STATUTE TO BE CONSTITUTIONALLY VALID.

The District Court of Appeal, in these three consolidated cases, reversed per curiam the trial court's orders dismissing the information filed in each case. The Honorable Frederick Hitt, County Judge, ruled in each case that the stalking statute, Section 784.048, Florida Statutes, is unconstitutionally vague. The Fifth District's per curiam opinion in this case consists of a citation to the Fifth District's earlier decision in Bouters v. State, 19 Fla. L. Weekly D678 (Fla. 5th DCA March 25, 1994), jurisdiction accepted no. 83,558 (Fla. June 21, 1994). In Bouters the Fifth District held that the term "harass" in the stalking statute is not unconstitutionally vague, and that the statute as a whole passes constitutional muster. (See appendix to this brief) The District Court's opinion paired this case for review with Bouters. See Jollie v. State, 405 So. 2d 418 (Fla. 1981).

The stalking statute makes it a crime to "willfully and maliciously harass" or to "willfully and maliciously follow" another person. The statute defines "harassment" as a course of conduct directed at a specific person which causes substantial emotional distress in that person and which serves no legitimate purpose. (See Judge Hitt's orders in the appendix to this brief) The question of the stalking statute's validity has been litigated in a number of cases statewide. Cf. Pallas v. State, 19 Fla. L. Weekly

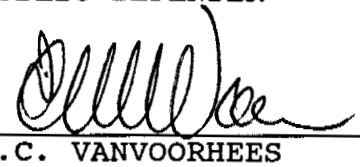
D988 (Fla. 3rd DCA May 3, 1994) (upholding statute) with State v. Knodel, 1 Fla. L. Weekly Supp. 542 (Fla. Escambia Cty. Ct. September 2, 1993) (invalidating statute; "follow" vague) and State v. Caraway, 1 Fla. L. Weekly Supp. 407 (Fla. Hernando Cty. Ct. May 12, 1993) (invalidating statute; "harass" vague). The petitioners submit that the statute is unconstitutionally vague and overbroad, and that it violates substantive due process in that it sweeps plainly innocent conduct protected by the First Amendment within its broad prohibition. The petitioners request this court to exercise its discretionary jurisdiction and to review the Fifth District Court's decision in these cases.

CONCLUSION

The petitioners request this court to accept jurisdiction of these consolidated cases.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER



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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Robert Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118; Michael J. Neimand, Assistant Attorney General, Ruth Bryan Owen Rhode Building, Dade County Regional Service Center, Suite 921N, 401 N.W. 2nd Avenue, Miami, Florida 33128; and mailed to Roger A. Daniels, 1435 Mara Court, Sanford, Florida 32771; and John P. Rogers, 375 Palm Springs Drive, #110, Altamonte Springs, Florida 32701, on this 13th day of July, 1994.

S.C. VANVOORHEES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ROGER ANTHONY DANIELS, MARK GIBSON, and JOHN ROGERS, Petitioners, vs. STATE OF FLORIDA, Respondent.	)	S.CT. CASE NO. DCA CASES NO. 93-1723 93-1724 93-1725 (CONSOLIDATED)

A P P E N D I X

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. 93-1723, 93-1724
93-1725

ROGER ANTHONY DANIELS,
MARK GIBSON,
JOHN ROGERS,

Appellees.

Opinion filed May 27, 1994

Appeal from the County Court
for Seminole County,
Frederick M. Hitt, County Judge.

Robert A. Butterworth, Attorney General, Tallahassee and Michael J. Neimand, Assistant Attorney General, 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 Appellees.

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.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

STATE OF FLORIDA,
Appellant,

v.

CASE NO. 93-1723, 93-1724, 93-1725

ROGER ANTHONY DANIELS,
MARK GIBSON,
JOHN ROGERS,
Appellee.

DATE: June 30, 1994

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR REHEARING, filed June 13, 1994, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Office of the Public Defender, 7th JC
Office of the Attorney General, Daytona Beach
Roger A. Daniels
John P. Rogers

State to be sentenced under the guidelines was involved. We find the distinction significant.

We find that procedurally, the facts of the instant case are identical to those in *State v. Hogan*, 611 So. 2d 78 (Fla. 4th DCA 1992). In *Hogan,* the defendant initially received a downward departure sentence negotiated and agreed to by the state. Hogan violated his probation, and when it was revoked, he was placed on a new and extended probation which was again a downward departure. The trial court's judgment did not set forth any written reasons supporting the downward departure from the guidelines. In affirming the trial court, the Fourth District stated:

> This court has held that the state's prior stipulation to a downward departure is a valid ground supporting a subsequent sentence below the guidelines. *State v. Devine*, 512 So.2d 1163 (Fla. 4th DCA), *rev. denied,* 519 So.2d 988 (Fla. 1987). Additionally, section 948.06(1), Fla.Stat. (1991) authorizes a trial court, in sentencing following a violation of probation, to impose "any sentence which it might originally have imposed before placing the probationer on probation . . . ."

Id. at 79. We concur. Of course, the trial judge could have sentenced Glover under the guidelines if he believed the facts surrounding the violation so justified. We believe *Hogan* is sound public policy because it gives trial judges greater flexibility when dealing with the many variables involved in violation hearings.

However, in light of the constraints of section 948.01(4), Florida Statutes (1993), we must remand with instructions to allow Glover credit for time previously served on community control for these offenses. *See State v. Ogden*, 605 So. 2d 155, 158 (Fla. 5th DCA 1992).

Sentence REVERSED and REMANDED with directions. (DAUKSCH, J., concurs. HARRIS, C.J., concurs in part; dissents in part, with opinion.)

(HARRIS, C. J., concurring in part; dissenting in part.) While I agree that *State v. Ogden,* 605 So. 2d 155 (Fla. 5th DCA 1992) requires reversal, I dissent from that portion of the opinion that permits the trial court to depart based on a previous negotiated plea.

I agree that the majority opinion is consistent with *State v. Hogan,* 611 So. 2d 78 (Fla. 4th DCA 1992); however, because I disagree with *Hogan,* I must dissent from the majority.

But for the negotiated plea arrived at during the *initial* appearance of this case in the system, unquestionably the sentencing judge, upon the finding of a violation of probation, would be required to sentence within the guideline range or give a written, acceptable reason for departure.

Rule 3.701(b)(6), Rules of Criminal Procedures, provides:

> While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentence established in the guidelines shall be articulated in writing and made when circumstances or factors reasonably justify the aggravation or mitigation of the sentence. (Emphasis added.)

Regardless of the internal inconsistency of the preamble clause and the underlined portion of the above provision, judges are *directed* to deviate only for *reasonable* circumstances or factors.

While it is reasonable to depart based on a negotiated plea at the initial sentencing, is it reasonable to use that original agreement which was clearly limited in time and condition, to justify future departures after the defendant has proved himself unable or unwilling to comply with the conditions that prompted the State to agree in the first instance?

To me, the answer is clearly no. Consider the facts of this case. Glover was charged with three counts of capital sexual battery. The State permitted him to plead to attempted sexual battery but with the condition that "there will be restraints on Mr. Glover and he will get counseling . . ." The court included in its original order placing Glover on community control the provision that "you will continue with mental health counseling and evaluation."

In the violation report, the officer advises the court:

> While the subject's attitude has not been rude, his compliant behavior can best be described as minimal. It is unclear to this officer whether the subject is truly "slow", or whether he is a typical sex offender waiting on the right moment. The Florida Department of Corrections has afforded the subject several opportunities to maintain an acceptable level of compliance. In the four months since his release from incarceration he has avoided mental health counseling. He lied to this officer in order to move to another county. He manipulated a situation bringing a three year child into his residence, and he has been found away from his new residence on two occasions in less than a week after relocating to Seminole County.

It is simply not reasonable to construe the State's original agreement to a downward departure as justifying a subsequent downward departure after Glover has breached a key condition of the agreement. It should be stated that the trial judge did not indicate that he was relying on the original negotiated plea to justify the departure. In fact, he gave no reason at all. The majority infers that since *Hogan* permits a downward departure on this basis, we will assume that the trial judge relied on *Hogan.* Perhaps he did.

Hogan relies, I believe, on an improper interpretation of that portion of section 948.06(1), Florida Statutes, (1991), which permits the sentencing judge in sentencing one who has violated probation to impose "any *sentence* which it might originally have imposed before *placing* the probationer on probation." [Emphasis added.] *Hogan* interprets this to mean that if the court had a valid reason for departure prior to originally placing the defendant on probation, it can use that original reason, regardless of new circumstances or conditions, for departure when the defendant is up for sentencing for the violation. Notice, however, that in section 948.06(1), the legislature recognized the distinction between a "sentence" and the "placing" of the defendant on probation. The legislature recognized that probation is not a sentence; it merely defers sentencing. This makes it clear that, by enacting section 948.06(1), the legislature did not intend to authorize the court to use an outdated negotiated plea agreement as a basis for departing from the guidelines. The legislature was merely emphasizing that the previous probation (deferring of sentence) would not restrict the trial court from imposing *any* appropriate *sentence* that it could have initially imposed when it finally decides to *sentence* the defendant.

I would reverse for sentencing within the guidelines.

* * *

Criminal law—Aggravated stalking—Statute is not unconstitutionally vague or overbroad

SCOTT BOUTERS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-504. Opinion filed March 25, 1994. Appeal from the Circuit Court for Orange County, Richard F. Conrad, Judge. James B. Gibson, Public Defender, and S. C. Van Voorhees, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael J. Neimand, Assistant Attorney General, Parker D. Thomson, Special Assistant Attorney General, and Carol A. Licko, Special Assistant Attorney General, 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.)

* * *

Criminal law—Lewd acts upon a child—Sexual activity with child—Evidence—Hearsay—Testimony regarding statements made to witnesses by child victim was not hearsay where child victim had testified and been cross-examined and where testimony was admitted to rebut inference that victim did not disclose abuse, that disclosure of abuse was at later time than that to which victim testified, and that victim's testimony was recent fabrication—No error to admit testimony without hearing outside presence of jury—Any error in admission of testimony of child's victim's aunt and uncle that victim would awake screaming during night was harmless—Jury instructions—Trial court's refusal to give jury instruction on voluntary intoxication as defense to primary charges although instruction was given as to lesser included offenses—Issue not preserved for appellate review where defendant did not request instruction as to primary offenses in trial court—Affirmative defense of voluntary intoxication does not extend to general intent crimes

JERRY DEAN BELCHER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-1653. Opinion filed March 25, 1994. Appeal from the Circuit Court for Orange County, Belvin Perry, Jr., Judge. Kirk N. Kirkconnell and David A. Henson of Kirkconnell, Lindsey & Snure, P.A., Winter Park, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee and Barbara C. Davis, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) Jerry Dean Belcher appeals his convictions on 12 counts of lewd acts upon a child[1] and one count of sexual activity with a child.[2] Belcher was sentenced to 17 years in the Department of Corrections on the charge of sexual activity with a child and 12 years on each count of lewd acts upon a child, all sentences to run concurrently. We affirm the convictions and the sentences.

FACTS

Belcher was arrested on 10 February 1992 after his minor daughter reported that he had engaged in sexual improprieties with her from June 1989 through August 1990. The state presented testimony from six witnesses relevant to this appeal: the victim, Belcher's daughter; her friend; her friend's mother; her aunt; her uncle; and, a physician from the Child Protection Team. The child testified that Belcher had fondled her vaginal area approximately once per month for five months beginning in January of 1989. She then testified that he progressed to a monthly fondling of her breasts and vaginal area during most of the following months between June 1989 and June 1990. His acts culminated in frequent digital penetration of her vagina in May, June and July of 1990 and ended with an act of simulated sexual intercourse on 4 August 1990. The last act prompted her to move into her aunt and uncle's home.

She testified that she had told her friend and her friend's mother about Belcher's actions, when they occurred, but no one else. She also testified that she told her aunt and uncle what happened. The final witness presented by the state was a doctor from the Child Protection Team who testified as to the child's physical condition after a medical examination. He testified that the child had small "notches" in the hymenal tissue consistent with repeated digital penetration and not consistent with an injury done by a tampon.

Prior to the trial beginning, Belcher moved to exclude hearsay statements made by the victim to other witnesses and that the state be required to proffer any possible hearsay statements outside the jury's presence because these statements would not qualify as early outcry, pursuant to section 90.803(1), (2) or (3) Florida Statutes (1991). The state agreed to proffer any statements before they were admitted. During the trial, however, the court allowed the witnesses to testify to statements made to them by the victim about Belcher's behavior. There was no proffer made outside the presence of the jury. The defense objected repeatedly to this testimony.

The defense also objected to testimony from the victim's aunt that after the victim came to live with them, she would awake in the night screaming "Daddy, get away from me. Daddy, don't do that. Stop." The defense objected to this testimony as hearsay and irrelevant to any legitimate issue in the case. The trial court overruled the objection and allowed the witness to testify. Although the defendant requested a proffer outside the presence of the jury, again, the request was denied. Belcher elected not to put on any witnesses or evidence after the state rested its case.

On appeal, Belcher argues that the requested instruction on voluntary intoxication should have been given as to all counts, although he only requested the instruction for the lesser included offenses of battery and assault at trial. The trial court did give the instruction to the lesser included offenses. Belcher argues this court should determine that the affirmative defense of voluntary intoxication should have been given as to all counts. Belcher was convicted and timely appeals.

POINTS ON APPEAL

Belcher raises three issues for appellate review. The first issue concerns the admissibility of hearsay evidence without a proffer being offered outside the presence of the jury in derogation of section 90.803(23), Florida Statutes (1991). The second issue is whether the trial court erred in allowing the victim's aunt to testify that the victim screamed in the night and to the words she screamed. The final point on appeal is whether the trial court erred in limiting the defendant's requested jury instructions on the affirmative defenses of voluntary intoxication to only the lessor included offenses of battery and assault instead of to all counts.

A. THE VICTIM'S PRIOR CONSISTENT STATEMENTS

The Florida supreme court in *Pardo v. State*, 596 So. 2d 665 (Fla. 1992) and *State v. Kopko*, 596 So. 2d 669 (Fla. 1992), held that a child's hearsay statements may be admissible when the statements qualify under the statutory exception of section 90.803(23), Florida Statutes (1991). However, the trial court must weigh the reliability and the probative value of the statements against the danger that the statements may unfairly prejudice the defendant, confuse the issues, mislead the jury or result in the presentation of needless cumulative evidence. Thus, the state may present hearsay testimony as long as the balancing test of *Pardo* and *Kopko* has been met.

In this case, it is conceded that the trial court did not conduct a hearing outside the presence of the jury as required by section 90.803(23), Florida Statutes (1991). The state argues, however, that the statements were not hearsay and that the statements were not offered to prove the truth of the matter asserted, i.e., that the defendant abused the victim. The statements by the four witnesses were offered to rebut the inference that the victim did not disclose the abuse or that the disclosure of the abuse was at a later time than that to which the victim testified. The trial court ruled that the testimony of the four witnesses was properly admitted because the testimony was not hearsay. The court ruled that because the defendant had cross-examined the victim and had questioned the victim's veracity, the testimony of the four witnesses regarding prior consistent statements of the victim was offered not to prove the truth of the matter asserted, but to show that the victim reported the abuse to friends and family contemporaneously with the abuse occurring. This testimony is not hearsay.[3] The testimony was not hearsay under section 90.801(2)(b), Florida Statutes (1991) which provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

IN THE COUNTY COURT, IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

ROGER ANTHONY DANIELS,

Defendants.

CASE NO. 93-3352-MMA

ORDER

Defendant moves to dismiss this action on the grounds that the Florida Stalking Statute, Sect. 784.048 F.S.A., is unconstitutional on its face in that it is vague and overbroad and in violation of due process under the Fifth and Fourteenth Amemdments to the United States Constitution and Article 1, Section 9 of the Florida Constitution. Additionally, Defendant claims that the statute violates the First Amendment of the United States Constitution and the Florida Constitution.

Florida Statute 784.048 attempts to criminalize the conduct commonly known as "stalking" and provides:

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.

DUE PROCESS STANDARD

The Constitutional standard of due process requires that a statute be declared void if it is so vague that "men of common intelligence must necessarily guess as to its meaning and differ as to its application". Connally v. General Construction Company, 269 U.S. 385, 391, 48 S Ct. 126, 127, 70 L Ed. 322 (1926); See Linville v. State, 359 So2d 450 (Fla. 1978). A fundamental requisite of due process is that a statute must clearly delineate the conduct it proscribes. Grayned v. City of Rockford, 408 U.S. 104; 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

Our first inquiry is whether the statute provides Constitutional due process. We have concluded that it does not, based upon the following analysis of essential words and terms employed in the statute.

SUBSTANTIAL EMOTIONAL DISTRESS

The statute defines "Harasses" as "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.

This definition places upon the citizen a duty to measure the subjective effect of his or her acts on another. The satute purports to criminalize communicative conduct based upon its emotional effect on the state of mind of the person to whom it is directed.

Conduct that an ordinary (reasonable) person might review as innocuous or non-threatening may in fact cause "substantial emotional distress" to a more timid person.

With no objective standard, a person acts at his own peril and potentially engages in stalking if the recipiant of that behavior is emotionally sensitive.

Further, neither the terms "substantial", nor "emotional distress" are defined by the statute itself. "Substantial" is defined in Black's Law Dictionary as:

> Of real value and importance; of considerable value. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal. Synonymous with material.

Webster's Dictionary defines "substantial" as:

> 1.a) Consisting of or relating to substance; b) Real, true. c) Important, essential. 2. Ample to satisfy or nourish; full. 3. Possessed of means; well-to-do. 4. Firmly constructed; sturdy. 5. Being that specified to a large degree or in the main (a victory).

These vague and varying definitions do not sufficiently define the quality or quantity of emotional distress necessary to invoke the stalking statute.

No definition whatsoever is found of the term "emotional distress", either within or outside of the statute. A common reference source of medical terms, DSM-111R, fails to recognize or define the term.

Did the legislature in using the term "emotional distress" mean something other than anger, fear or depression? The use of

the term without definition renders the statute vague and unclear.

NO LEGITIMATE PURPOSE

In order to fit the definition of "harasses", the course of conduct must serve no legitimate purpose. Again, what is a legitimate purpose and what is an illigitimate purpose is undefined and left to the subjective judgment of the reader.

Is blowing an automobile horn in a traffic jam a legitimate purpose? Is attempting to collect an indebtedness a legitimate purpose? Is attempting to address and resolve a sensitive issue with a loved one a legitimate purpose? Or are all of the above acts potentially criminal?

The same phrase was declared unconstitutionally vague in People v. Norman, 703 P2d, 1261 (Colo. 1985) where the Supreme Court of Colorado dealt with a similar statute.

The use of the term "legitimate business" to describe an exception to a curfew ordinance rendered the law unconstitutionally overbroad and vague in K.L.J. v. State, 581 So2d, 920 (Fla. 1st DCA 1991). See also Papachniston v. City of Jacksonville, 405 U.S. 156 (Fla. 1972).

CONSTITUTIONALLY PROTECTED ACTIVITY

The legislature has sought to exclude constitutionally protected activity from the course of conduct condemned by the statute. Again, other than citing picketing or other organized protests as examples of constitutionally protected activity, we are left without a definition of a crucial term.

Can we expect the ordinary citizen or the police officer to be constitutional scholars, and to know which forms of expression are

protected and those that are not? Or would there be a chilling effect on expression?

The statute appears to afford greater protection to a group than to the individual. Organized activities are protected, where an individual acting on his own may be charged criminally. Thus it appears that the attempt to exclude constitutionally protected activity not only renders the statute void for vagueness, but also points to its second fatal flaw - that it is unconstitutionally overbroad. See Spears v. State, 337 So2d, 977 (Fla. 1976), in which the Supreme Court of Florida stated:

> "The mere existance of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose asdvice we seem generally to be most in need of".

In summary, the use of the terms "substantial emotional distress", "no legitimate purpose" and "constitutionally protected activity" in the definition of "harasses", with no guidance to citizens, law enforcement and the courts to understand and apply those terms, renders the statute unconstitutionally vague. Additionally, the statute is declared to be unconstitutionally broad.

Defendant's Motion to Declare Florida Statute 784.048 unconstitutional on Its Face and Dismiss the Charge is granted.

DONE and ORDERED in Chambers in Sanford, Seminole County,

Florida, this 14 day of June, 1993.

COUNTY COURT JUDGE

Copies to:

Office of the State Attorney, 100 E. 1st Street, Sanford, Fla. 32771
Office of the Public Defender, 301 N. Park Ave., Sanford, Fla. 32771

PAGE(s) MISSING

IN THE COUNTY COURT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

JOHN PATRICK ROGERS,

Defendants.

CASE NO. 93-2425MMA

ORDER

Defendant moves to dismiss this action on the grounds that the Florida Stalking Statute, Sect. 784.048 F.S.A., is unconstitutional on its face in that it is vague and overbroad and in violation of due process under the Fifth and Fourteenth Amemdments to the United States Constitution and Article 1, Section 9 of the Florida Constitution. Additionally, Defendant claims that the statute violates the First Amendment of the United States Constitution and the Florida Constitution.

Florida Statute 784.048 attempts to criminalize the conduct commonly known as "stalking" and provides:

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.

DUE PROCESS STANDARD

The Constitutional standard of due process requires that a statute be declared void if it is so vague that "men of common intelligence must necessarily guess as to its meaning and differ to its application". Connally v. General Construction Company, 269 U.S. 385, 391, 48 S Ct. 126, 127, 70 L Ed. 322 (1926); See Linville v. State, 359 So2d 450 (Fla. 1978). A fundamental requisite of due process is that a statute must clearly delineate the conduct it proscribes. Grayned v. City of Rockford, 408 U.S. 104; 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

Our first inquiry is whether the statute provides Constitutional due process. We have concluded that it does not, based upon the following analysis of essential words and terms employed in the statute.

SUBSTANTIAL EMOTIONAL DISTRESS

The statute defines "Harasses" as "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.

This definition places upon the citizen a duty to measure the subjective effect of his or her acts on another. The satute purports to criminalize communicative conduct based upon its emotional effect on the state of mind of the person to whom it is directed.

Conduct that an ordinary (reasonable) person might review as innocuous or non-threatening may in fact cause "substantial emotional distress" to a more timid person.

With no objective standard, a person acts at his own peril and potentially engages in stalking if the recipiant of that behavior is emotionally sensitive.

Further, neither the terms "substantial", nor "emotional distress" are defined by the statute itself. "Substantial" is defined in Black's Law Dictionary as:

> Of real value and importance; of considerable value. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal. Synonymous with material.

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> 1.a) Consisting of or relating to substance; b) Real, true. c) Important, essential. 2. Ample to satisfy or nourish; full. 3. Possessed of means; well-to-do. 4. Firmly constructed; sturdy. 5. Being that specified to a large degree or in the main (a victory).

These vague and varying definitions do not sufficiently define the quality or quantity of emotional distress necessary to invoke the stalking statute.

No definition whatsoever is found of the term "emotional distress", either within or outside of the statute. A common reference source of medical terms, DSM-111R, fails to recognize or define the term.

Did the legislature in using the term "emotional distress" mean something other than anger, fear or depression? The use of

the term without definition renders the statute vague and unclear.

NO LEGITIMATE PURPOSE

In order to fit the definition of "harasses", the course of conduct must serve no legitimate purpose. Again, what is a legitimate purpose and what is an illigitimate purpose is undefined and left to the subjective judgment of the reader.

Is blowing an automobile horn in a traffic jam a legitimate purpose? Is attempting to collect an indebtedness a legitimate purpose? Is attempting to address and resolve a sensitive issue with a loved one a legitimate purpose? Or are all of the above acts potentially criminal?

The same phrase was declared unconstitutionally vague in People v. Norman, 703 P2d, 1261 (Colo. 1985) where the Supreme Court of Colorado dealt with a similar statute.

The use of the term "legitimate business" to describe an exception to a curfew ordinance rendered the law unconstitutionally overbroad and vague in K.L.J. v. State, 581 So2d, 920 (Fla. 1st DCA 1991). See also Papachniston v. City of Jacksonville, 405 U.S. 156 (Fla. 1972).

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The legislature has sought to exclude constitutionally protected activity from the course of conduct condemned by the statute. Again, other than citing picketing or other organized protests as examples of constitutionally protected activity, we are left without a definition of a crucial term.

Can we expect the ordinary citizen or the police officer to be constitutional scholars, and to know which forms of expression are

protected and those that are not? Or would there be a chilling effect on expression?

The statute appears to afford greater protection to a group than to the individual. Organized activities are protected, where an individual acting on his own may be charged criminally. Thus it appears that the attempt to exclude constitutionally protected activity not only renders the statute void for vagueness, but also points to its second fatal flaw - that it is unconstitutionally overbroad. See Spears v. State, 337 So2d, 977 (Fla. 1976), in which the Supreme Court of Florida stated:

> "The mere existance of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose asdvice we seem generally to be most in need of".

In summary, the use of the terms "substantial emotional distress", "no legitimate purpose" and "constitutionally protected activity" in the definition of "harasses", with no guidance to citizens, law enforcement and the courts to understand and apply those terms, renders the statute unconstitutionally vague. Additionally, the statute is declared to be unconstitutionally broad.

Defendant's Motion to Declare Florida Statute 784.048 unconstitutional on Its Face and Dismiss the Charge is granted.

DONE and ORDERED in Chambers in Sanford, Seminole County,

Florida, this 14 day of June, 1993.

COUNTY COURT JUDGE

Copies to:

Office of the State Attorney, 100 E. 1st Street, Sanford, Fla. 32771
Office of the Public Defender, 301 N. Park Ave., Sanford, Fla. 32771

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BOOK 2637 PAGE 0913
SEMINOLE CO. FL.

TR 6-2-93
FH

IN THE COUNTY COURT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,

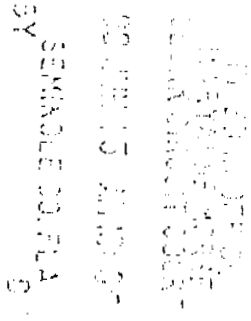
Plaintiff,

vs.

MARK GIBSON,

Defendants.

CASE NO. 92-10942MMA



ORDER

Defendant moves to dismiss this action on the grounds that the Florida Stalking Statute, Sect. 784.048 F.S.A., is unconstitutional on its face in that it is vague and overbroad and in violation of due process under the Fifth and Fourteenth Amemdments to the United States Constitution and Article 1, Section 9 of the Florida Constitution. Additionally, Defendant claims that the statute violates the First Amendment of the United States Constitution and the Florida Constitution.

Florida Statute 784.048 attempts to criminalize the conduct commonly known as "stalking" and provides:

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.

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