IN THE SUPREME COURT OF FLORIDA

ROBERT K. KAHLES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 84,748

PETITIONER'S REPLY BRIEF

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

STACEY PASTEL DOUGAN
Assistant Public Defender
Florida Bar No. 908177
DIANE M. CUDDIHY
Florida Bar No. 434760
Office of the Public Defender
201 S.E. 6th Street
North Wing - Third Floor
Ft. Lauderdale, Fl. 33301
(305) 831-8814

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Petitioner is alarmed at Respondent's constant attempts to confuse the issue involved in his appeal. Before both the Fourth District Court of Appeal and this Court, Respondent has persistently claimed that Petitioner has challenged the Florida stalking statute in its entirety.[1] This contention is wholly without merit and impossible to support. First, Petitioner was charged with violating section 784.048(2) of the Florida Statutes, which by definition creates the offense of misdemeanor stalking. Accordingly, the prosecution was commenced in the County Court for the Seventeenth Judicial Circuit in and for Broward County, Florida. Despite Respondent's refusal to recognize it, county courts lack jurisdiction to adjudicate the constitutionality of a felony statute.[2]

Secondly, Petitioner lacks standing to challenge the felony (or "aggravated") statute because the Information charged him with misdemeanor stalking.[3] (R 38-39). Accordingly, his "Motion

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[1] 4th DCA Br. at 1-3; Ans. Br. at 1. Respondent's position is confusing because after claiming that Petitioner challenges the entire statute, it states that it "will address the additional aspects of the Statute beyond Section 784.048(2) should this Court, in the interest of judicial economy, wish to review the entire Statute in one case." Ans. Br. at 8. This assertion is disingenuous because, as Respondent acknowledges, this Court currently has under the consideration the felony statute in Bouters v. State, 634 So. 2d 246 (Fla. 5th DCA 1993), review granted, 640 So. 2d 1106 (Fla. 1994).

[2] See Art. V, § 20, Fla. Const.; § 34.01, Fla. Stat. (1991).

[3] The Information charged Defendant with violating section 784.048(2) of the Florida Statutes, which provides as follows:

to Declare Florida's Misdemeanor Stalking Statute Unconstitutional"[4] addressed only the misdemeanor provisions of the statute.[5] And, in fact, the trial court's order striking down as unconstitutionally vague and overbroad the statute references specifically the misdemeanor provisions.[6] (R 81). Moreover, Respondent's allusion to a "misdemeanor felony"[7] level of stalking is baffling: The statute contains no such offense.

Respondent's references to the felony provisions[8] serve only to obscure the issues before this Court. The misdemeanor stalking statute does not require that a defendant possess the intent to cause another person to fear for her or his safety.[9] Nor does the misdemeanor provision require that a defendant make

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> 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.

[4] (R. 50-64) (emphasis added).

[5] Specifically, Defendant challenged section 784.048(2) of the Florida Statues. Inherent in the challenge were subsection (1)(a) (the definition of "harasses") and subsection (1)(b) (the definition of "course of conduct"). The other provision at issue is section 784.048(5), which permits a police officer to arrest without a warrant a person the officer believes violated section 784.048(2).

[6] The trial court referred in its order only to subsections 784.048(1)(a) and (b), (2) and (5).

[7] Ans. Br. at 1.

[8] Specifically, sub-sections 1(c), (3), or (4), of the statute.

[9] § 784.048(1)(c), (3), Fla. Stat. (1992).

a credible threat against the life or safety of another person.[10] Accordingly, any discussions of subsections (3) or (4) of the stalking statute are irrelevant to the issues on appeal.

Despite Respondent's suggestion that various district court of appeal decisions have rendered its answer brief "redundant,"[11] Petitioner reminds this Court that no district has addressed the misdemeanor provision of the Florida stalking statute. Nor has any court adjudicated whether the term "follows" is constitutionally sound. Although those provisions were at issue in State v. Kahles, 644 So. 2d 512 (Fla. 4th DCA 1994), the court refrained from analyzing the statute. Instead it relied upon the opinions in Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994) and Bouters v. State, 634 So. 2d 246 (Fla. 5th DCA), rev. granted, 640 So. 2d 1106 (Fla. 1994). Those decisions adjudicated only the felony provisions of Florida's stalking statute. Thus Petitioner's case represents a case of first impression.

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[10] Id.

[11] This contention is peculiar in light of Respondent's acceptance "as a substantially accurate account of the proceedings below" the statement of the case in Petitioner's Initial Brief before this Court. (Ans. Br. at 4).

ARGUMENT

Given the brevity and non-responsive nature of Respondent's Answer Brief, Petitioner relies on the arguments raised in his Initial Brief with a few exceptions.

I. OVERBREADTH

A. Follows

Respondent's assertions that "this case involves stalking by harassment"[12] and that "the statute generally deals with stalking and harassing"[13] are patently false. Petitioner was charged with stalking by following or harassment and the statute criminalizes both. Respondent's attempt to ignore that the Florida Legislature criminalized the act of following in this statute does not make it go away. The legislature offered no definition for "follows" and did not require that it be accompanied by any threat or specific intent to harm another. Nor is constitutionally protected behavior exempt from the prohibition on following.

Following by definition includes innocent and constitutionally protected conduct. As this Court recognized in Wyche v. State, 619 So. 2d 231 (Fla. 1993), the freedom of movement unquestionably falls within the purview of activity protected by the First Amendment. The legislature's failure to distinguish between protected and non-protected conduct within this statute renders it unconstitutionally overbroad. Id.

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[12] Ans. Br. at 11

[13] Ans. Br. at 12.

In addition, Respondent's attempt to rely on this Court's decision in Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 644 (Fla. 1994), aff'd in part, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994) and the Supreme Court's decision in Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994), is fatally flawed. By Respondent's own admission, the presence of threatening conduct was integral to the holding in both cases. (Ans. Br. at 11-12).

Operation Rescue and Madsen illustrate the inevitability of stalking statutes being applied to abortion protests. Although the state has an unambiguously legitimate interest in and duty to protect women's health care centers from anti-abortion terrorism, the stalking statute criminalizes the act of following regardless of the protester's intent and regardless of the impact that behavior has upon another person. Respondent has not, and could not, argue that the statute parallels the specificity of the injunction at issue in Operation Rescue, which this Court recognized was necessary to avoid its application to constitutionally protected activity.

B. Harasses

The misdemeanor stalking statute does not require that either following or harassment be accompanied by a credible threat; only the felony statute contains a credible threat provision. Respondent's characterization of Pallas is therefore misleading because it neglects to mention that the court explicitly adjudicated the "harassment plus threat" provision of

the stalking statute--that is, the felony statute. Pallas, 636 So. 2d at 1363.

Petitioner agrees that not all expressive conduct receives First Amendment protection; especially where the conduct "produce[s] special harms distinct from their communicative impact." Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993); see also Arnett v. Kennedy, 416 U.S. 134, 162 (1974). Nevertheless, because the statute fails to define with sufficient particularity the nonprotected conduct proscribed, the state's reliance on Mitchell is misplaced. The penalty enhancement statute at issue there explicitly criminalized "intentionally selecting" a victim based upon clearly defined factors. Id. at 2197 (emphasis added); see also Colten v. Kentucky, 407 U.S. 104, 111 (1972) (upholding narrowly drawn statute prohibiting refusal to disperse with intent to cause annoyance or harm to others); accord State v. Elder, 382 So. 2d 687 (Fla. 1980) (finding statute prohibiting anonymous phone calls specifically directed at unprotected conduct). At most, the Court recognized, the statute permitted the introduction into evidence of speech to show motive, but specifically did not criminalize the speech itself. Mitchell, 113 S. Ct. at 2198.

Respondent's suggestion that the statute punishes only conduct does not avert an overbreadth challenge. Although the legislature defined "harasses" as a "course of conduct," the line between speech and conduct is far from clear. See Cohen v. California, 403 U.S. 15, 16-18 (1971). The same is true of the

line between protected and unprotected conduct. Compare Texas v. Johnson, 491 U.S. 397 (1989), with United States v. O'Brien, 391 U.S. 367 (1968).

The misdemeanor stalking statute's lack of precise definitions of what conduct is prohibited renders it easily susceptible to application to protected speech and/or conduct. See, e.g., Cox v. Louisiana, 379 U.S. 536 (1965) (striking down statute due to failure to limit to unprotected expression); Coates v. Cincinnati, 402 U.S. 611 (1971) (finding statute failed to provide objective standard of "annoy"). Respondent has failed to show that this statute was drawn as "narrowly as possible" to prevent the law from applying to constitutionally protected expression. Wyche, 619 So. 2d at 234. Thus the statute violates the First Amendment.

II. VAGUENESS

A. "Knowingly," Willfully," Maliciously" and Repeatedly"

Respondent's reliance on the word "knowingly" to avert a vagueness challenge[14] is non-sensical considering that the word is present nowhere in the context of the misdemeanor statute. Again, Respondent's argument stems from its confusing references to the felony statute.[15] Moreover, Respondent's argument that, taken together, the qualifiers willfully and maliciously amount to a specific intent requirement does not save the statute against a constitutional challenge. At best, the intent

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[14] Ans. Br. at 15.

[15] See § 784.048(4), Fla. Stat. (Supp. 1992).

proscribed under the statute is "evil" or "bad." Respondents cannot suggest that a law criminalizing a "bad" purpose, without more, passes constitutional muster. Regardless of the ordinary meaning of these words, they fail to clarify the meaning of follows or harasses.

B. Harasses

Respondent looks to the federal Victim Protection Act of 1982[16] to provide a definition for "harasses." Its characterization of the Eleventh Circuit's decision in United States v. Tison, 780 F.2d 1569 (11th Cir. 1986), is both misleading and misplaced. Respondent asserts that the court in Tison "upheld this model for the definition of 'harassment' in the Florida Stalking Statute, although the statute's constitutionality was not in issue." Ans. Br. at 20. Respondent simply cannot claim that in 1986, a federal court considered the meaning of a word in the context of the stalking statute, which was passed in 1992.

Furthermore, Respondent argues that the definitions of "harasses" and "substantial emotional distress" are derived from the civil cause of action of intentional infliction of emotional distress. Specifically, it relies upon this Court's recognition of the tort of intentional infliction of emotional distress and its adoption of the definition for that cause of action from the Restatement (Second) of Torts. Metropolitan Life Ins. Co. v.

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[16] Pub. L. No. 97-291, 96 Stat. 1248, codified at 18 U.S.C. §1514.

McCarson, 467 So. 2d 277 (Fla. 1985). Respondent's position completely disregards the critical distinction between civil and criminal liability. In addition, absolutely nothing within the statute or the legislative history of this law indicates that the legislature intended to adopt a tort definition for "harasses." Respondent's view is more confusing because the definition for extreme and outrageous conduct (which the state suggests constitutes criminal harassment) explicitly rejects that such conduct could be characterized by malice alone. McCarson, 467 So. 2d at 278 (quoting § 46(d) Restatement (Second) of Torts (1965)). Thus, if Respondent's contention is correct, the stalking statute's requirement of malice is completely at odds with the definition of "harasses" as defined by McCarson. Ultimately, however, Respondent's assertion is without any foundation and it fails to explain how the stalking statute conveys to citizens or police officers the definition of "harasses."

Respondent's attempts to draw from civil common law and statutes the definition of "harasses" illustrates the unconstitutionality of the criminal statute at issue in this case. In order to comply with the notice requirement of due process, a statute must afford some sort of standard through its own text or in conjunction with the subjects covered in the statute. Connally v. General Constr. Co., 269 U.S. 385, 391-92 (1926). Although the statute offers a definition of harasses, that definition is unconstitutionally vague.

C. "SUBSTANTIAL EMOTIONAL DISTRESS"

Respondent's failure to respond to Petitioner's Initial Brief is evident in its contention that Petitioner argued that the subjective nature of substantial emotional distress would criminalize the response of "highly sensitive" people. Petitioner never advanced that argument.

Respondent also relies upon tort law to provide a definition for substantial emotional distress within the context of the stalking statute. Again, the reliance on McCarson and the Restatement (Second) of Torts is misplaced. Both merely define the type of conduct that causes the intentional infliction of emotional distress; they do not explain what constitutes emotional distress. See McCarson, 467 So. 2d at 277.

This absence of definition within the statute and the state's inability to show that somehow "substantial emotional distress" is self-defining contribute to the statute's vagueness. This becomes critical considering that criminal liability is predicated on a victim's substantial emotional distress regardless of whether the defendant intended to cause such a reaction. The presence of substantial emotional distress in and of itself makes otherwise innocent behavior criminal under the statute. Not only are ordinary citizens unlikely to comprehend what constitutes substantial emotional distress; police officers too must make that determination in deciding whether probable cause exists for an arrest. This utter failure to place citizens on notice as to an element of the offense of stalking and to

provide law enforcement with clear standards to govern enforcement violates due process. Grayned v. City of Rockford, 408 U.S. 104 (1972); Linville v. State, 359 So. 2d 450 (Fla. 1978).

D. "Serves a [sic] Legitimate Purpose" and "Constitutionally Protected Activity"

Respondent asserts that the phrase "serves a [sic] legitimate purpose" within the statute is "of no moment because the terms are superfluous." (Ans. Br. at 23). Respondent's contention is completely bereft of reason or authority, ignoring this Court's warning that courts must not presume that the legislature intended statutory language to have no meaning unless that is the only possible construction. Florida Police Benevolent Assn' v. Department of Agric. and Consumer Servs., 574 So. 2d 120, 122 (Fla. 1991). The legislature doubtlessly intended for this language to have a profound meaning: it was meant to ensure that the statute is not applied to conduct serving a legitimate purpose. The statute's failure to place citizens on notice of what constitutes a legitimate or illegitimate purpose renders it unconstitutionally vague.

The danger of the phrase "serves no legitimate purpose" is revealed in courts' concerns that such a subjective standard leads to arbitrary and discriminatory enforcement of the law. This Court recognized the danger of such a subjective standard in Hermanson v. State, 604 So. 2d 775 (1992), where the state prosecuted parents' reliance on spiritual healing, claiming that they were not "legitimately" practicing their religion. This

Court struck down the child abuse statute under which they were prosecuted, reasoning that the statute violated due process because it failed to "clearly indicate when . . . conduct becomes criminal." Id. at 782.

Given courts' universal concern with such language, the state's willingness to dismiss as "surplusage" this phrase begs the question at best and constitutes an alarming disregard for citizens' rights to due process at worst. The state's construction leaves unaddressed dangerous offenders who claim their motives are grounded in love or affection, when in reality their desire is to dominate or control the victim. If claiming "romance" constitutes a "legitimate purpose," offenders can easily escape the statute's scope. (See Initial Brief 25-27).

The state fails to recognize that the statute provides no standards for what constitutes legitimate purpose. Nor does the statute reveal who determines whether a legitimate purpose is demonstrated. To allow law enforcement to make that determination expressly invites arbitrary and discriminatory application of the statute. Because the Stalking Statute suffers from vague, unintelligible definitions, the injection of a subjective standard to determine legitimacy of purpose renders the statute unequivocally unconstitutional.

Petitioner relies upon the arguments contained in his Initial Brief to reply to Respondent's arguments concerning the "constitutionally protected activity" exemption. (Initial Br. 29-30).

CONCLUSION

Respondent has failed to respond specifically to the majority of the arguments Petitioner advanced in the Initial Brief. By failing to distinguish between the misdemeanor and felony statutes, Respondent's arguments are both confusing and misleading. Most critically, Respondent relies upon Pallas as a full examination and consideration of the constitutionality of Florida's misdemeanor stalking statute. Unless the misdemeanor statute is addressed on its own, trial courts too may conclude that Pallas, and this Court's eventual decision in Bouters, govern the interpretation of the misdemeanor statute.

Accordingly, Petitioner respectfully requests this Court to grant jurisdiction to avoid the inevitable confusion that will follow if the misdemeanor statute is not addressed. Furthermore, based upon Petitioner's arguments in his Initial and Reply Briefs, Petitioner requests this Court to find that Florida's misdemeanor stalking statute is on its face unconstitutionally vague and overbroad.

Respectfully Submitted,

ALAN H. SCHREIBER
PUBLIC DEFENDER
17TH JUDICIAL CIRCUIT

STACEY PASTEL DOUGAN
Assistant Public Defender
Florida Bar No. 908177
201 S.E. 6th Street, Room 730
North Wing - Third Floor
Ft. Lauderdale, Fl. 33301

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed to Assistant Attorney General Michael J. Neimand, Department of Legal Affairs, 401 N.W. 2nd Avenue, N-921, Post Office Box 013241, Miami, Florida, 33101, this 7th day of February, 1995.

Dyna M. Loughry for
STACEY PASTEL DOUGAN