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## INTRODUCTION

The Petitioner, the **STATE OF FLORIDA**, was the Appellant below. The Respondent, **ROBERT L. JOHNSON**, was the Appellee below. The parties will be referred to as they stand before this Court. The symbol "R" will designate the record on appeal, the symbol "T" will designate the transcript of proceedings, and the symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The facts are succinctly stated by the Third District as follows:

In March 1993, a permanent injunction against domestic violence was served upon Johnson. The injunction prohibited him from engaging in any criminal offense resulting in physical injury to Andrea Green, entering onto her place of residence or place of employment, or abusing, threatening, or harassing her. Johnson violated the terms of the injunction by entering Green's place of residence, and pled no contest to the charge of criminal contempt that arose from that violation.

At the same time, and based upon the same conduct - Johnson's entry onto Green's residence - the State filed an information charging Johnson with aggravated stalking by violating a prior injunction. Johnson moved to dismiss the information on the ground of double jeopardy; the trial court granted the motion.

(A. 2).

The Third District affirmed the order dismissing on double jeopardy grounds, the charge of aggravated stalking. (A. 1). This affirmance was based on the reasoning that aggravated stalking in violation of an injunction is a species of a lesser included offense of the contempt charge. This finding was based on the premise that there was no conceivable way in which Respondent could have committed aggravated stalking against the victim without also violating the terms of the injunction, a crime for which Respondent had previously been convicted. (A. 2). The Court reached this conclusion by looking at the

contents of the injunction and not the contents of the actual charging documents. (A. 3).

Petitioner then timely filed its Notice to Invoke the Discretionary Conflict Jurisdiction of this Court. Petitioner's Motion to Stay Mandate was granted by the Third District. This Court then accepted jurisdiction of the cause.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS THE CHARGE OF AGGRAVATED STALKING IN VIOLATION OF AN INJUNCTION ON DOUBLE JEOPARDY GROUNDS WHERE THE RESPONDENT PLED GUILTY TO CONTEMPT FOR VIOLATING THE INJUNCTION ON CHARGES CONTAINING DIFFERENT ELEMENTS FROM THE AGGRAVATED STALKING CHARGE.

### SUMMARY OF THE ARGUMENT

The instant charge of aggravated stalking in violation of a injunction is not barred as a successive prosecution under the Double Jeopardy Clause where the Respondent has been found in contempt of court for violating the injunction for merely contacting the victim. This is so because each offense contains different elements. Although both offenses requires knowledge of the injunction, the contempt only required proof of simple contact. Aggravated stalking, however, requires proof of a specific intent to cause the victim substantial emotional distress. Since the elements are different, both actions can be maintained.



## ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS THE CHARGE OF AGGRAVATED STALKING IN VIOLATION OF AN INJUNCTION ON DOUBLE JEOPARDY GROUNDS WHERE THE RESPONDENT PLED GUILTY TO CONTEMPT FOR VIOLATING THE INJUNCTION ON CHARGES CONTAINING DIFFERENT ELEMENTS FROM THE AGGRAVATED STALKING CHARGE.

In United States v. Dixon, 509 U.S. \_\_\_, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), the United State's Supreme Court held that the Double Jeopardy Clause's protection attaches in non-summary criminal contempt prosecutions just as it does in other criminal prosecutions. In the contexts of both multiple punishments and successive prosecutions, the double jeopardy bar applies if two offenses for which the defendant is punished or tried cannot survive the same elements test of Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The same elements test inquires whether each offense contains an element not contained in the other. If they do not then they are the same offense and double jeopardy bars additional punishment or successive prosecution.

The Supreme Court then applied this holding to both Dixon and Foster, the Respondents who were consolidated for the Petition. Dixon was arrested and released on bond. A condition of his bond made any violation of the criminal code a violation of his condition of release. While on bond, Dixon was indicted for possession of cocaine with intent to distribute. Dixon was also found in contempt for violating a condition of his release

because of his arrest and indictment for the cocaine charge. A indictment was then filed on the cocaine charge. The dismissal of the cocaine charge on double jeopardy grounds was upheld by the United States Supreme Court on the grounds that the substantive criminal offense of possession of cocaine with intent to distribute was a lesser included offense of contempt based on the violation of a condition of his release, violating a criminal law. This was so because the order on release on bond incorporated the entire criminal code into the conditions for release. Therefore, double jeopardy would have barred Dixon's conviction for any substantive offense since the contempt incorporated all substantive offenses and Dixon was found in contempt for possession of cocaine with the intent to distribute. The Court held, that under these facts, the substantive charge was a lesser included offense of the contempt conviction and was barred under the multiple prosecution section of the Double Jeopardy Clause.

Foster's factual scenario is similar to the instant case. Foster's wife obtained a civil protection order against Foster. The order, which Foster consented to, required that he not molest, assault, or in any manner threaten or physically abuse his wife. Subsequently, Foster's wife prosecuted Foster for three separate instances of threats and two assaults. The court found Foster guilty on three counts of criminal contempt, which included two assaults and one threat. The United States then

obtained an indictment against Foster charging him with simple assault, three counts of threatening to injure another, and assault with intent to kill. His wife was the complainant in all counts; the first and last counts were based on the events for which Foster had been held in contempt, and the other three were based on the alleged events for which Foster was acquitted of contempt.

The United States Supreme Court held that the Dixon analysis, as applied to Foster, barred the subsequent prosecution of the assault charge. However, the Court found that the assault with intent to kill and the three counts of threats to injure were not barred by the Double Jeopardy Clause. The assault with intent to kill contained different elements than the contempt for simple assault. The contempt required proof of knowledge of the injunction order and willful violation of one of its conditions, simple assault. Assault with intent to kill requires proof of specific intent to kill while simple assault does not. Similarly, the Court found that the contempt offense required proof of knowledge of the protection order, which assault with intent to kill does not. Therefore, these crimes were different offenses and the subsequent prosecution did not violate the Double Jeopardy Clause. The same analysis was used for the three counts of threat to injure and they were also found not to be barred by the Double Jeopardy Clause.

The State submits that the instant case is controlled by the Foster scenario rather than the Dixon scenario. The Respondent herein was charged with violating the injunction by entering the victim's residence. To be held in contempt for this act the State had to prove knowledge of the injunction and the mere trespass into the residence. A conviction for aggravated stalking requires knowledge of the injunction and proof that the Defendant willfully, maliciously and repeatedly followed or harassed the victim. This requires proof of a specific intent to act with a bad purpose or evil intent to cause substantial emotional distress to the victim. As such, aggravated stalking in violation of a injunction requires proof of a specific intent to cause the harm while the contempt required only proof of contact without a specific intent to do any harm. Therefore, prosecution for aggravated stalking is not barred by the Double Jeopardy Clause.

The Florida Legislature, has resolved this issue in Section 775.021(4)(a), Florida Statutes (1993) in favor of a strict Blockburger analysis:

(4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. (Emphasis added).

An application of the foregoing rule of construction establishes that the aggravated stalking charge is not a lesser included offense of the contempt charge. Therefore, the granting of the dismissal on double jeopardy grounds was error.

The criminal contempt charge arising out of the simple entering of the victim's residence required only proof of a knowing and willful violation of the court ordered injunction. Richardson v. Lewis, 639 So. 2d 1098 (Fla. 2d DCA 1994). The aggravated stalking charge not only requires proof of a knowing and willful violation of the court ordered injunction but also requires proof that the acts in violation of the court order be willful, malicious and repeated with the intent to cause substantial emotional distress to a reasonable person in the victim's position and which serves no legitimate purpose. Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994). Therefore, under Section 775.021(4)(a), the aggravated stalking charge was not subsumed under the language of the injunction and therefore was not a species of a lesser included offense of the contempt charge.

In State v. Miranda, 644 So. 2d 342 (Fla. 2nd DCA 1994) the Court when faced with the exact same situation, found no double jeopardy problem since the Second District looked at what was charged to determine the elements of the offense. In Miranda, the Second District held that a defendant can be

Miranda, the Second District held that a defendant can be prosecuted for both criminal contempt for violating an injunction and aggravated stalking in violation of the injunction since the two prosecutions survives the same elements test of Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In Miranda, a domestic violence injunction was entered against defendant which enjoined him physically abusing, threatening, or harassing the victim, either directly or indirectly, at any time or place and enjoined him from entering on or about the victim's place of employment. The defendant pled guilty to criminal contempt for violating above provisions of the injunction. The State also filed an information against defendant charging him with aggravated stalking in violation of the same domestic violence injunction and the same conduct that the criminal contempt conviction was based on. The trial court granted the motion to dismiss based on double jeopardy, but the Second District reversed.

In reversing the granting of the motion to dismiss, the Court relied on the Blockburger test, examining the elements of both the criminal contempt charge and the aggravated stalking charge to see if each requires proof of an element that the other does not. It found that both the aggravated stalking charge and the contempt charge required proof that an injunction for protection had been issued. However, the Court did not compare the entire injunction to the aggravated stalking charge, but only

compared the elements of the violated conditions of the injunction to the remaining elements of aggravated stalking. The Court found that aggravated stalking requires proof that a person "knowingly, willfully, maliciously and repeatedly follows or harasses another person"; that "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"; that "course of conduct" includes the requirement that there be a "series of acts over a period of time". The Court found that no such requirements were contained in the elements of the violated conditions of the injunction. (Emphasis added). The condition that the defendant not "harass the Petitioner either directly or indirectly, at any time or place whatsoever", may be violated by a single act of harassment as defined by its plain meaning since no statutory definition was provided. The Court then held:

. . . Thus, the aggravated stalking charge includes elements not included in the contempt charge. The fact that evidence of repeated phone calls may constitute the proof to be adduced at both the contempt trial and the aggravated stalking trial does not render these charges the same offense. The focus in doing a Blockburger analysis is on the statutory elements of the offenses and not on the accusatory pleadings or proof to be adduced at trial in a particular case.

Id. at 2345. The Court then found that the contempt charge also required proof of violation of the element of the condition that defendant "not enter or about Petitioner's place of employment" and that this was not necessary to prove the aggravated stalking

charge. Therefore, the contempt charge also included an element not included in the aggravated stalking charge.

The Fifth District's decision in McCray v. State, 640 So. 2d 1215 (Fla. 5th DCA 1994) also supports the State's position. In McCray, the defendant claimed that it was error to deny his motion to dismiss charges based on double jeopardy grounds. He claimed that he was prosecuted for the same offense twice; first in a contempt proceeding, and second, for the underlying offense for which he had been previously held in contempt. The Fifth District had to remand the case because it did not have a sufficient record to determine the issue:

. . . We do not have before us the order below which found McCray guilty of criminal contempt, or findings as to which acts he committed violated the court's earlier protection order. Thus it is impossible for us to make a proper Blockburger comparison of the criminal contempt offense with the May 22 offenses . . . (Footnote omitted).

Id. at 1218.

In Richardson v. Lewis, *supra*, an injunction for protection prohibiting the defendant from, among other things, committing battery on or entering the residential premises of former girlfriend was entered. He was charged with criminal contempt for violating the injunction by entering the home and attacking the former girlfriend. As a result of this conduct, defendant was charged with armed burglary and aggravated battery. After being convicted of criminal trespass and



aggravate battery he moved to dismiss the contempt charge a double jeopardy grounds, which was denied by the trial court. The Second District affirmed because it found conduct charged in the criminal contempt contained different elements than the substantive offenses.

This same result was reached the Colorado Supreme Court in People v. Allen, 868 P 2d 379 (Colo. 1994). In Allen, his wife obtained a permanent restraining order against him prohibiting Allen from contacting his wife. Allen violated this restraining order by breaking into his wife's residence and threatening to kill her. The trial court found that Allen had knowledge of the restraining order and violated it by merely contacting her.

Allen was then found in contempt of court. Thereafter, based on the same break in, Allen was charged with burglary, criminal mischief, menacing and criminal trespass. The Colorado Supreme Court found that the Double Jeopardy Clause does not bar the successive prosecution because the elements to prove contempt, knowledge of the court's order and a deliberate violation of the order, were not contained in the criminal charges of burglary, mischief, menacing or trespass. Since the elements were different the crimes were not the same and they were not barred by double jeopardy.


In the instant case the Third District affirmed the order dismissing on double jeopardy grounds, the charge of aggravated stalking. This affirmance was based on the reasoning that aggravated stalking in violation of an injunction is a species of a lesser included offense of the contempt charge. This finding was based on the premise that there was no conceivable way in which Defendant could have committed aggravated stalking against the victim without also violating the terms of the injunction, a crime for which Defendant had previously been convicted. The Court reached this conclusion by looking at the contents of the injunction and not the contents of the actual charging documents. Clearly, this holding is erroneous and should be quashed.

CONCLUSION

Based on the foregoing, Petitioner submits that the instant decision expressly and directly conflicts with those cited herein and respectfully requests this Court quash the Third District's decision .

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS was furnished by mail to MANUEL ALVAREZ, Attorney for Respondent, 1320 N.W. 14th Street, Miami, Florida 33125 on this 2 day of April, 1995.

  
MICHAEL J. NEIMAND  
Assistant Attorney General

mls/

IN THE SUPREME COURT OF FLORIDA  
CASE NO. 84,854

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERT L. JOHNSON,

Respondent.

---

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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



IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, A.D. 1994

93-12114

THE STATE OF FLORIDA,

Appellant,

vs.

ROBERT L. JOHNSON,

Appellee.

\*\*  
\*\*  
\*\* CASE NO. 93-2734  
\*\*  
\*\*

Opinion filed October 26, 1994.

An Appeal from the Circuit Court for Dade County, Scott J. Silverman, Judge.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Manuel Alvarez, Assistant Public Defender, for appellee.

Before BASKIN, JORGENSEN, and GERSTEN, JJ.

PER CURIAM.

The State appeals from an order dismissing, on double jeopardy grounds, a charge of aggravated stalking. We affirm.

In March, 1993, a permanent injunction against domestic violence was served upon Johnson. The injunction prohibited him from engaging in any criminal offense resulting in physical injury to Andrea Green, entering onto her place of residence or place of employment, or abusing, threatening, or harassing her. Johnson violated the terms of the injunction by entering Green's place of residence, and pled no contest to the charge of criminal contempt that arose from that violation.

At the same time, and based upon the same conduct - Johnson's entry onto Green's residence - the State filed an information charging Johnson with aggravated stalking by violating a prior injunction. Johnson moved to dismiss the information on the ground of double jeopardy; the trial court granted the motion.

The trial court properly dismissed the charge of aggravated stalking. To determine whether the double jeopardy provision bars a subsequent prosecution, the Supreme Court has applied the "same-elements test"<sup>1</sup> which "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." United States v. Dixon, 509 U.S. ~~113~~ 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556, \_\_\_\_\_ (1993) (citations omitted). In Dixon, the Court applied the same-elements test to bar a prosecution for possession of cocaine with intent to

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<sup>1</sup> See Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 130, 182, 76 L. Ed. 306, 309 (1932).

distribute after Dixon had already been found guilty of contempt of court for violating a condition of his release by engaging in a criminal act, namely the precise substantive offense with which he had been charged: possession of cocaine with intent to distribute. The crime of violating a condition of his release could not be "abstracted from the 'element' of the violated condition." Dixon, 509 U.S. at \_\_\_, 113 S. Ct. at 2857, 125 L. Ed. 2d at \_\_\_.

In this case, as in Dixon, the substantive charge was subsumed under the language of the injunction. There is no conceivable way in which Dixon could have committed aggravated stalking against the victim without also violating the terms of the injunction, a crime for which he had already been convicted. In the language of Dixon, aggravated stalking is "a species of lesser-included offense" of the contempt charge, id. (citations omitted); the rule against double jeopardy thus barred the subsequent prosecution for aggravated stalking. See also Illinois v. Vitale, 447 U.S. 410, 421, 100 S. Ct. 2260, 2267, 65 L. Ed. 2d 228, 238 (1980) (person convicted of crime having several elements included in it may not subsequently be tried for lesser-included offense consisting solely of one or more elements of crime for which he already was convicted).

AFFIRMED.

93-132242-2  
IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, A.D. 1994  
WEDNESDAY, NOVEMBER 30, 1994

THE STATE OF FLORIDA,  
Appellant,  
vs.  
ROBERT L. JOHNSON,  
Appellee.

\*\*  
\*\*  
\*\* CASE NO. 93-2734  
\*\*  
\*\*

Upon consideration, appellant's motion for rehearing is hereby denied. Baskin, Jorgenson and Gersten, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALONE  
Clerk District Court of  
Appeal, Third District

BY Manuel Alvarez  
Deputy Clerk

cc: Michael S. Neffand

Manuel Alvarez

LS/NB



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