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IN THE SUPREME COURT OF FLORIDA

FILED
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JAN 16 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ROGER WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,476

INITIAL BRIEF OF PETITIONER

On Appeal from the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida (Criminal Division)

RICHARD L. JORANDBY
Public Defender

ANTHONY CALVELLO
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ORIGINAL

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal.

The symbol "T" will denote transcripts of hearings in the trial court.

STATEMENT OF THE CASE AND FACTS

Petitioner, Roger Williams, was charged by way of an Information filed in the Nineteenth Judicial Circuit in and for St. Lucie County with the offense of aggravated stalking of Rolanda Townsend which was alleged to have occurred between October 16, 1993 and December 1, 1993. R 1.

Prior to the instant criminal information being filed against Petitioner in circuit court, Rolanda Townsend filed a motion for contempt on November 10, 1993, based upon a domestic violence injunction protective order issued on October 25, 1993, against Petitioner alleging that Petitioner had called, threatened, and followed her to her residence where he banged on her door on November 5, 1993, and then again on November 6, 1993. R 78.

On November 17, 1993, Rolanda Townsend filed a second motion to find Petitioner in contempt when he drove by her residence between November 13, 1993 and November 16, 1993, thus allegedly creating a fear of stalking in her. R 8.

A third motion for contempt was filed against Petitioner on December 2, 1994, alleging that between November 21 and November 26, 1993, and again on December 1, 1993, Petitioner went to Ms. Townsend's residence, threatened her and cut her telephone and cable television lines. R 8.

On February 24, 1994, a hearing was held on the contempt charges filed against Petitioner by Ms. Townsend. T 6. Petitioner was found ***guilty*** of violating the protective order/domestic violence injunction and sentenced to 150 days in the county jail. R 8.

On March 25, 1994, Petitioner filed a sworn motion to dismiss the criminal information filed against him in the circuit court charging

him with the aggravated stalking of Rolanda Townsend between October 16, 1993 and December 1, 1993. R 7-8. Petitioner argued that the double jeopardy clause prohibited this prosecution since he was previously tried, convicted, and sentenced for violating the protective order issued on behalf of Rolanda Townsend for the same conduct which occurred between November 3, November 6, November 13-16, November 21-26, and December 1, 1993. Petitioner further argued that because all of the elements of aggravated stalking as charged in this case (Case No. 93-2778 CF) were included in the former criminal contempt prosecution of February 24, 1994, the State is now barred from prosecuting Petitioner for any conduct toward Rolanda Townsend which has already been punished in the criminal contempt prosecution. R 7-8.

On March 31, 1994, a hearing was held on Petitioner's sworn motion to dismiss. T 1-17. Petitioner testified at the hearing that a protective order and domestic violence injunction was issued against him on October 25, 1993 on behalf of Rolanda Townsend. T 4-6. A number of violations of this protective order and/or injunction were subsequently filed against Petitioner by Rolanda Townsend. T 4-6. A contempt hearing was held on these violations on February 24, 1994. T 6. At said hearing, Petitioner admitted to violating the protective order and/or injunction by having contact with Rolanda Townsend between October 25, 1993 and December 2, 1993. T 6. Specifically, Petitioner admitted that he threatened her, banged on her front door, drove by her residence and cut her telephone and cable television lines. T 5-6. As a result of Petitioner's admissions at the February 24, 1994, contempt hearing, Petitioner was convicted and sentenced to 150 days in the county jail. T 6.

The trial court took judicial notice of the aggravated stalking information filed against Petitioner (Case No. 93-2778) in this cause, which provided:

> BETWEEN THE DATES OF OCTOBER 16, 1993 AND DECEMBER 1, 1993 ... [Petitioner] did unlawfully, after an injunction for protection against repeat violence pursuant to Florida Statute 784.046, or an injunction for protection against repeat domestic violence pursuant to Florida Statute 741.30 ... ***knowingly, willfully, maliciously and repeatedly follow or harass the said Rolanda Townsend*** ...

R 1.

Petitioner's counsel argued that, in light of Petitioner's February 24, 1994 contempt conviction, the instant prosecution for aggravated stalking was prohibited by the double jeopardy clause. T 7. In addition, for this aggravated stalking prosecution, the prosecution must establish that an injunction had been previously issued against the defendant. T 13. This was the same injunction which formed the basis of Petitioner criminal contempt conviction. The trial court subsequently issued a written order denying Petitioner's motion to dismiss. R 11.

On July 13, 1994, Petitioner pled nolo contendere to the charge of aggravated stalking (Case No. 93-2778 CF) and expressly reserved his right to appeal the denial of his motion to dismiss. Petitioner was scored pursuant to the Fla.R.Crim.P. 3.701 sentencing guidelines to a permitted guidelines sentence range of one (1) to three and one half (3½) years in prison. R 26. Petitioner was sentenced to three (3) years in prison with credit for one hundred and forty (140) days time served. R 29-30. Petitioner filed a timely notice of appeal in the Fourth District Court of Appeal.

The Fourth District in a written opinion Williams v. State, 658 So. 2d 665 (Fla. 4th DCA 1995) [See Appendix] held that "a defendant held in contempt for violating a domestic violence injunction may be prosecuted later for a substantive offense stemming from the same conduct that gave rise to the contempt adjudication." Id.

Timely Notice of Discretionary Review was filed by Petitioner to this Honorable Court.

SUMMARY OF THE ARGUMENT

Petitioner, Roger Lee Williams, was charged and convicted of criminal contempt for violating a domestic violence injunction. Later, Petitioner was convicted of the felony of aggravated stalking by violating the same domestic violence injunction. Petitioner contends that the trial court reversibly erred in denying his pre-trial motion to dismiss the aggravated stalking charge on the basis of the double jeopardy clause. The double jeopardy clause barred the instant prosecution for aggravated stalking where Petitioner had previously been convicted and sentenced for criminal contempt for violating a domestic violence injunction based upon the same conduct.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER'S SWORN MOTION TO DISMISS BECAUSE THE DOUBLE JEOPARDY CLAUSE BARRED PETITIONER'S SUBSEQUENT PROSECUTION FOR AGGRAVATED STALKING WHERE PETITIONER HAD PREVIOUSLY BEEN CONVICTED OF CRIMINAL CONTEMPT FOR VIOLATING A DOMESTIC VIOLENCE INJUNCTION BASED ON THE SAME CONDUCT.

The double jeopardy clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Constitution, Amendment V. "[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." United State v. Halper, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989); North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1968).[1]

The core of the Double Jeopardy Clause is the protection it affords against successive prosecutions -- that is, against efforts to impose punishment for the same offense in two or more separate proceedings. That protection applies with equal force whether the first prosecution results in a conviction or acquittal. See Burks v. United State, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Whatever other abuses the Clause prohibits, at its most fundamental level it

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[1] The Supreme Court has also indicated that parallel civil and criminal proceedings for the same offense may violate the Double Jeopardy Clause's prohibition against successive punishments for the same offense. See Department of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994) (holding that imposition of criminal sanctions followed by the imposition of a civil post-forfeiture tax on illegal drugs is a violation of the Double Jeopardy Clause); United States v. Halper, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897 (1989) (holding that civil penalties imposed after criminal punishments can constitute a violation of the Double Jeopardy Clause).

protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense. "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." Abbate v. United States, 359 U.S. 187, 198-99, 79 S.Ct. 666, 672-73, 3 L.Ed.2d 729 (1969) (opinion of Brennan, J.). This Court has held that criminal contempt is a crime. Aaron v. State, 284 So. 2d 673 (Fla. 1973). The United States Supreme Court in United States v. Dixon, 509 U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) expressly held that the protections of the double jeopardy clause apply to criminal contempt prosecutions.

On October 25, 1993, Rolanda Townsend obtained a protective order injunction against Petitioner. T 6-7. Petitioner was prohibited from having any contact with Rolanda Townsend. T 6-7. Said order specifically prohibited Petitioner from having any contact with her at her residence, in addition to engaging in any assault, battery, or violent type of behavior. T 9, 10. On February 24, 1994, Petitioner was charged and convicted of violating this protective order and/or domestic violence injunction issued on October 25, 1993. R 8.

The instant aggravating stalking prosecution alleges that Petitioner, in violation of a domestic violence injunction between the dates of October 16, 1993 and December 1, 1993, did "willfully, maliciously and repeatedly follow or harass the said Rolanda Townsend in violation of Florida Statute 784.048(4)." R 12.

Petitioner contends that the trial court reversibly erred in denying his sworn motion to dismiss on the basis of the double

jeopardy clause. The rule against double jeopardy barred the instant prosecution for aggravated stalking where Petitioner had previously been convicted and sentenced for criminal contempt for violating a domestic violence injunction based upon the same conduct.

To determine whether the double jeopardy clause bars a subsequent prosecution, the U.S. Supreme Court has devised the "same elements test" which inquires whether each offense contains an element not contained in the other; if not, they are the "same offense and double jeopardy bars additional punishment and successive prosecutions." U.S. v. Dixon, 113 S. Ct. at 2856. In U.S. v. Dixon, the court applied the same elements test to ***bar*** a prosecution for possession of cocaine with intent to distribute after the defendant had already been found guilty of contempt of court for violating a condition of his bail release by engaging in a criminal act, namely the precise substantive offense with which he had been charged in the criminal information, i.e., possession of cocaine with intent to distribute. Further, the U.S. Supreme Court in U.S. v. Dixon, supra, made clear that 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.

In State v. Johnson, 644 So. 2d 1028 (Fla. 3d DCA 1994), the Third District held that the defendant's conviction for violating an injunction against domestic violence barred his subsequent prosecution for aggravated stalking under the double jeopardy clause. The Third District, citing Dixon, supra, held:

> In this case, as in Dixon, the substantive charged was subsumed under the language of the injunction. There is no conceivable way in which Dixon could have committed aggravating 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 of 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).
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> Id. at 1029 [Emphasis Added].

The Second District in Hernandez v. State, 624 So. 2d 782 (Fla. 2d DCA 1993), held that a conviction for indirect criminal contempt violated the double jeopardy clause because the defendant had already been prosecuted for battery and violation of an injunction of protection, which offenses were the foundation for the contempt. The Hernandez court explained that U.S. v. Dixon "established that the Double Jeopardy Clause prohibits the subsequent prosecution for a substantive offense that underlies a criminal contempt charge for which one has been convicted. It also holds the converse, i.e., subsequent prosecution for criminal contempt, the basis of which is a substantive offense for which a conviction has been obtained, violates the Double Jeopardy Clause." Id. at 783.

In Fierro v. State, 653 So. 2d 447 (Fla. 1st DCA 1995), the defendant was convicted of concealing or removing a minor child contrary to a court order in violation of Section 787.64, F.S. (1993) along with false imprisonment and use of a firearm in the commission of a felony. On appeal, the defendant argued that his conviction for concealing or removing a minor child contrary to a court order was barred by the double jeopardy clause because he had previously been convicted of criminal contempt based on his violation of the same court order. The First District agreed with the defendant and reversed his

conviction for concealing or removing a minor child contrary to court orders under the double jeopardy clause. The First District explained:

> In the present case, each offense does not include a separate element. While it would be possible to violate the court order by taking the child out of the Second Circuit without written consent, without also violating the statute, which requires removal from the state or concealment, it would not be possible for appellant to violate the statute without also violating the September 17 court order, for which he had already been held in contempt, because the statute requires that the removal be in violation of a court order.
>
> In *Hernandez*, the contempt based on simple battery "was incorporated into and could not be abstracted from the injunction for protection which was violated." *Richardson v. Lewis*, 639 So. 2d 1098, 1100 (Fla. 2d DCA 1994). Similarly, in the present case, the contempt based on violation of the temporary custody order cannot be abstracted from the statutory offense.

Id. at 449.

In this situation in which the contempt conviction was imposed for violating a domestic violence injunction, the later attempt to prosecute Petitioner for aggravated stalking through violation of the same domestic violence order/injunction resembles the situation found in the felony murder context. See U.S. v. Dixon, 113 S.Ct. at 2857.

In Harris v. Oklahoma, 433 U.S. 602, 97 S.Ct. 2912 (1977), the U.S. Supreme Court held that a subsequent prosecution for robbery with a firearm was barred by the double jeopardy clause because the defendant had already been tried for felony murder based on the same underlying felony. For double jeopardy purposes, "the crime generally described as felony murder" is not "a separate offense distinct from

its various elements." Illinois v. Vitale, 447 U.S. 410, 420-421, 100 S.Ct. 2260, 2267 (1980); U.S. v. Dixon, 113 S.Ct. at 2857.[2]

Therefore, on the authority of Dixon, Johnson, Fierro, and Hernandez, the Fourth District Court of Appeal erred in ruling that the double jeopardy clause did not bar Petitioner's subsequent conviction for aggravated stalking. Hence, Petitioner's conviction for said offense should be vacated on remand.

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[2] The Second District in State v. Miranda, 644 So. 2d 342 (Fla. 2d DCA 1994), clearly misapplied the Dixon decision to arrive at the erroneous conclusion that the double jeopardy clause did not bar the subsequent aggravated stalking charge filed against the defendant there. For some inexplicable reason the Miranda court focused on the elements of the violated condition of injunction unsupported by the Dixon decision. See Fierro, 653 So. 2d at 449.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Honorable Court to reverse this cause with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33401-2299 by courier and to Michael Neimand, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Avenue, N921, Miami, Florida, 33128, by U.S. Mail this 12th day of January, 1996.

Attorney for Roger Williams

A P P E N D I X

trial court proceeded to enter the order now appealed. The order changed primary residence to the father, recounting the mother's lifestyle concerning other men, finding this was a "very disruptive atmosphere for the children," and that the father's lifestyle was more stable.

While we understand the trial court's commendable concern for the welfare of the children, the court "jumped the gun" and thereby denied the mother due process. Although the mother was allowed to put on some testimony, she had every reason to believe this was only in furtherance of her motion to allow her fiance to move in the house. Moreover, the mother argues on appeal that she had additional witnesses (a teacher, neighbor), who would demonstrate the children were not adversely affected by the mother's lifestyle and marital plans. These witnesses did not have an opportunity to testify. Thus, we can find no evidentiary support for the trial court's finding that the mother's lifestyle was disruptive to the children. More importantly, the trial court committed reversible error in changing primary residence, even on a temporary basis, at a hearing that was not noticed for that issue. *Begens v. Begens*, 617 So.2d 360 (Fla. 4th DCA 1993).

Reversed and remanded for further proceedings consistent with this opinion.

STONE, POLEN and PARIENTE, JJ., concur.

Roger Lee WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 94-2798.

District Court of Appeal of Florida, Fourth District.

Aug. 2, 1995.

Rehearing and Certification of Conflict Denied Aug. 30, 1995.

After being held in contempt for violating domestic violence injunction, defendant was convicted in the Circuit Court, St. Lucie County, Larry Schack, J., of aggravated stalking, and he appealed. The District Court of Appeal, Stevenson, J., held that defendant could be prosecuted for substantive offense stemming from the same conduct which gave rise to the contempt.

Affirmed.

Double Jeopardy ⇐34

Defendant held in contempt for violating domestic violence injunction may be prosecuted later for substantive offense stemming from the same conduct.

Richard L. Jorandby, Public Defender, and Anthony Calvello, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Michael D. Thompson and Carol A. Licko, Sp. Asst. Attys. Gen., Miami, for appellee.

STEVENSON, Judge.

Appellant, Roger Lee Williams, was convicted of aggravated stalking and was also found in contempt for violation of a domestic violence injunction. Williams appeals the trial court's order denying his sworn motion to dismiss on double jeopardy grounds. We affirm.

The first issue in this appeal is whether a defendant held in contempt for violating a domestic violence injunction may be prosecuted later for a substantive offense stemming from the same conduct that gave rise to the contempt adjudication. We agree with the recent analysis of this issue by the Second District Court and answer that question in the affirmative. *See State v. Miranda*, 644 So.2d 342 (Fla. 2d DCA 1994).

Appellant also challenges the constitutionality of section 784.048, Florida Statutes (1993), on the basis that the stalking statute is both void for vagueness and violates the

overbreadth doctrine of the First Amendment. However, the constitutionality of this section has been upheld by both this district and most recently, the Florida Supreme Court. *Bouters v. State*, 20 Fla.L.Weekly S186 (Fla. April 27, 1995); *State v. Kahles*, 644 So.2d 512 (Fla. 4th DCA 1994), *approved*, 657 So.2d 897 (Fla.1995); *Blount v. State*, 641 So.2d 200 (Fla. 4th DCA), *approved*, 654 So.2d 126 (Fla.1995); *Kostenski v. State*, 641 So.2d 199 (Fla. 4th DCA 1994).

PARIENTE and SHAHOOD, JJ., concur.

Theodore Patrick FREED, Appellant,

v.

STATE of Florida, Appellee.

No. 94–2051.

District Court of Appeal of Florida, Fifth District.

Aug. 4, 1995.

Defendant was convicted in the Circuit Court, Volusia County, Edwin P.B. Sanders, J., after entering plea of nolo contendere, to violating his probation in two cases, and he appealed his sentence. The District Court of Appeal, Harris, J., held that combined sanctions of incarceration and community control within applicable sentencing guidelines range providing term of years was valid.

Affirmed.

1. Criminal Law ⇐982.9(7)

Combined sanctions of 364 days' incarceration and two years' community control were permitted after defendant violated his probation in two cases, though applicable sentencing guidelines range only provided for term of years, where defendant's recommended guidelines range was term of years between two and one-half and three and one-half years. West's F.S.A. RCrP Rules 3.701(d)(14), 3.988(f).

2. Criminal Law ⇐982.9(7), 1319

After revocation of probation, trial court may increase defendant's sentence to next higher cell in sentencing guidelines scoresheet without requiring reason for departure. West's F.S.A. RCrP Rule 3.701(d)(14).

3. Criminal Law ⇐1261

Where applicable sentencing guidelines range does not contain disjunctive language requiring choice between either incarceration or community control, but only provides term of years, combination of incarceration and community control may be imposed.

James B. Gibson, Public Defender, and M.A. Lucas, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Michael D. Crotty, Asst. Atty. Gen., Daytona Beach, for appellee.

HARRIS, Judge.

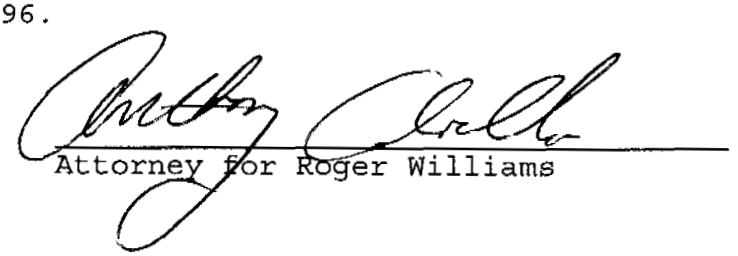
The issue on appeal is whether the trial court erred in sentencing the defendant to both incarceration and community control when the sentence fell within a range that had a recommended term of years but a permitted term of incarceration *or* community control.

In January, 1993, Appellant Theodore Freed was charged with knowingly uttering or issuing a worthless check in case number 92–0999. He pled *nolo contendere* in exchange for the prosecutor's recommendation of a guidelines sentence. Freed's scoresheet total placed him in the first cell with a recommended and permitted range of any non-state prison sanction. The court withheld adjudication and placed Freed on probation for two years.

In November, 1993, Freed was charged with committing unlawful sale or delivery of a controlled substance in case number 93–1321. He pled *nolo contendere* to the lesser included offense of attempted sale and delivery and was placed on probation for a period

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33401-2299 by courier and to Michael Neimand, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Avenue, N921, Miami, Florida, 33128, by U.S. Mail this 12th day of January, 1996.



Attorney for Roger Williams