IN THE SUPREME COURT OF FLORIDA

ROGER WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 86476

DCA Case No. 94-2798

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

RICHARD L. JORANDBY
Public Defender
Fifteenth Judicial Circuit of Florida

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Roger Williams

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee below.

In the brief, the parties will be referred to as they appear before this Honorable 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, Florida, 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 information being filed against Petitioner, three separate motions for contempt were filed against Petitioner by Ms. Townsend based upon a domestic violence injunction/protective order issued on October 25, 1993, against Petitioner. R 8, 78.

A hearing was held on the contempt charges filed against Petitioner by Ms. Townsend. 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 written sworn motion to dismiss the instant Information charging Petitioner with aggravated stalking of Rolanda Townsend between October 16, 1993 and December 1, 1993. R 7-8. The trial court subsequently issued a written order denying Petitioner's motion to dismiss on double jeopardy grounds. 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 sentenced to three (3) years in prison with credit for one hundred and forty (140) days time served. R 29-30.

Timely notice of appeal was filed by Petitioner to the Fourth District Court of Appeal. R 33. The Fourth District, in a written opinion rendered on August 2, 1995, *Williams v. State*, 20 Fla. L. Weekly D1778 (Fla. 4th DCA August 2, 1995)[See Appendix 1] held that Appellant's conviction and sentence for "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." *Williams v. State*, 20 Fla. L.

Weekly D1778 (Fla. 4th DCA August 2, 1995). The *Williams* court expressly relied on the decision of the Second District in *State v. Miranda*, 644 So. 2d 342 (Fla. 2d DCA 1994) in rejecting Petitioner's double jeopardy claim. Petitioner filed a Motion for Rehearing with the Fourth District on August 3, 1995, which was denied by the court on August 30, 1995 [See Appendix 2]. Notice of Discretionary Review was filed by Petitioner [See Appendix 3].

SUMMARY OF ARGUMENT

This court has the authority pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law.

The instant decision of the Fourth District Court of Appeal rejecting Appellant's double jeopardy challenge to an aggravated stalking prosecution based on the identical conduct which formed the basis for his prior conviction for criminal contempt is in direct and express conflict with the decision of the Third District in *State v. Johnson*, 644 So. 2d 1028 (Fla. 3d DCA 1994) [See Appendix 4] and the First District in *Fierro v. State*, 653 So. 2d 447 (Fla. 1st DCA 1995) [See Appendix 5].

ARGUMENT

THIS COURT HAS JURISDICTION OVER THE INSTANT DECISION OF THE FOURTH DISTRICT ON THE BASIS OF DIRECT AND EXPRESS CONFLICT WITH TWO DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

This court has the authority pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. See *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988).

Petitioner respectfully submits that this Honorable Court has discretionary jurisdiction over the instant cause on the basis of direct and express conflict with the decision of the Third District in *State v. Johnson*, 644 So. 2d 1028 (Fla. 3d DCA 1994) and the First District in *Fierro v. State*, 653 So. 2d 447 (Fla. 1st DCA 1995).

In the instant case, the Fourth District held that the trial court did not err in denying Petitioner's motion to dismiss on double jeopardy grounds his conviction for aggravated stalking in light of his prior conviction for criminal contempt for violation of a domestic violence injunction involving the identical parties and events. Judge Stevenson, writing for the court, explained:

> 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' 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).

Williams v. State, 20 Fla. L. Weekly D1778 (Emphasis Added].

In *State v. Johnson*, *supra*, 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 *United States v. Dixon*, 113 S. Ct. 2849 (1993), held:

> 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 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).

Id. at 1029 [Emphasis Added].

In *Fierro v. State*, *supra*, the First District, citing *Johnson*, held that a conviction for concealing or removing a minor child contrary to court order in violation of § 787.04, *Florida Statutes* (1993) after the defendant has been convicted of criminal contempt based on a violation of the same order was barred by the double jeopardy clause.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." In *United States v. Dixon*, *supra*, the United States Supreme Court held that the protections of the double jeopardy clause apply to criminal contempt prosecutions. It is important that this Honorable Court take the instant cause because the Fourth District's misapplication of the double jeopardy clause deprives citizens of their double jeopardy

rights after being convicted and imprisoned for the identical conduct in a prior criminal contempt conviction.

In the instant case, as in *Dixon*, the substantive charge (aggravated stalking through violation of the domestic violence injunction) was subsumed under the language of the domestic violence injunction. There is no conceivable way Petitioner could have committed this type of aggravated stalking against the identical victim without also violating the terms of the domestic violence injunction, a crime (criminal contempt) for which he had already been convicted and sentenced to a term of imprisonment. The double jeopardy clause thus barred Petitioner's subsequent prosecution for aggravated stalking. The instant opinion expressly conflicts with the decisions of two other district courts of appeal on the identical question of law. Hence, this Honorable Court has jurisdiction over the instant cause.

Petitioner respectfully requests this Honorable Court to accept jurisdiction over the instant cause and vacate the decision of the Fourth District Court of Appeal.

CONCLUSION

Petitioner requests this Court to accept jurisdiction to review the merits of this case.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
Fifteenth Judicial Circuit of Florida

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Roger Williams

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401-2299 by courier and to Michael Niemand, Esquire, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, 33101, this 6th day of September, 1995.

Attorney for Roger Williams

IN THE SUPREME COURT OF FLORIDA

ROGER WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. _____

DCA Case No. 94-2798

APPENDIX

case the insurer. However, there is no indication that the trial court considered, or was asked to consider, the denial of this claim on any basis other than by interpreting the policy and applying the stipulated facts on the merits of the insured's claim. Therefore, we have reviewed the trial court decision on the basis presented to it, without deciding whether, in similar cases the coverage issue should be resolved by finding whether the administrator's decision was arbitrary.

Therefore, the final judgment is reversed. (PARIENTE, J. and BROWN, LUCY, Associate Judge, concur.)

* * *

Criminal law—Costs—State attorneys' fees are not recoverable as prosecution costs under section 939.01(1), Florida Statutes—Error to require payment of restitution without determining defendant's ability to pay

TERRANCE WEEKS, Appellant/Cross-Appellee, v. STATE OF FLORIDA, Appellee/Cross-Appellant. 4th District. Case No. 94-0577. L.T. Case No. 93-300 CF. Opinion filed August 2, 1995. Appeal and cross-appeal from the Circuit Court for Martin County; Larry Schack, Judge. Counsel: Richard L. Jorandby, Public Defender, and Karen Ehrlich, Assistant Public Defender, West Palm Beach, for appellant/cross-appellee. Robert A. Butterworth, Attorney General, Tallahassee, and Anne Carrion Pinson, Assistant Attorney General, West Palm Beach, for appellee/cross-appellant.

(PER CURIAM.) We affirm appellant's conviction for DUI manslaughter and sentence of twelve years DOC incarceration, followed by three years probation. However, we reverse the trial court's imposition of (1) prosecution costs to reimburse state attorneys' fees, and (2) restitution without a determination of appellant's ability to pay, and remand.

As for the former imposition, the state's position is not persuasive. State attorneys' fees are not recoverable as costs of prosecution under section 939.01(1), Florida Statutes (1991 & Supp. 1992). *See, e.g., Bell v. State*, 652 So. 2d 1192 (Fla. 4th DCA 1995); *Smith v. State*, 606 So. 2d 427 (Fla. 1st DCA 1992), *rev. denied*, 618 So. 2d 211 (Fla. 1993). Section 939.01(1), Florida Statutes, reads:

> (1) In all criminal cases the costs of prosecution, including investigative costs incurred by law enforcement agencies, and by fire departments for arson investigations, if requested and documented by such agencies, shall be included and entered in the judgment rendered against the convicted person.

Based on the language of subsection (1), the *Smith* court concluded that costs of prosecution are limited to investigative costs incurred by law enforcement agencies and five departments.

The state asserts that the interpretation of costs of prosecution in *Smith*, which is the seminal decision in this area, was limited by subsection (9), which reads:

> (9) Investigative costs which are recovered shall be returned to the appropriate investigative agency which incurred the expense. Costs shall include actual expenses incurred in conducting the investigation and prosecution of the criminal case; however, costs may also include the salaries of permanent employees.

Thus, the state contends that the definition of costs of prosecution has been broadened by the subsequent addition of subsection (10), which was added after the year of the statute that was applicable in *Smith*. *See, e.g., Bell*, 652 So. 2d at 1193. Subsection (10) reads:

> (10) Costs that are collected by the state attorney under this section shall be deposited into the state attorney's grants and donations trust fund to be used during the fiscal year in which the funds are collected, or in any subsequent fiscal year, for actual expenses incurred in investigating and prosecuting criminal cases, which may include the salaries of permanent employees.

§ 939.01(10), Fla. Stat. (Supp. 1992). More recent cases do not discuss the effect of subsection (10) on the definition of costs of prosecution.

Contrary to the state's contention that subsection (10) should be read to broaden the *Smith* court's definition of prosecution the language of subsection (1) itself and its reference to investigative costs. This restriction of costs of prosecution to investigative costs incurred by law enforcement agencies and fire departments does not depend upon any reference in subsection (9). This makes sense because although subsection (9) reiterates what can be included as costs, in our view, its function is to inform us where costs recovered are to be returned.

We believe that subsection (10) has a similar function in that it informs us only how those investigative costs collected by the state attorney's office are to be utilized. A careful reading of this language only indicates that costs collected and deposited into the designated fund can be utilized to pay expenses of prosecution, including salaries of permanent employees of the state attorney's office. However, this does not say that the costs taxed against the defendant can include attorneys' fees.

With respect to the question of restitution, because the trial court erred in ordering restitution without a determination of appellant's ability to pay same, on remand the trial court has the option of either conducting the appropriate evidentiary hearing or striking the restitution provision. *See* § 775.089(6), Fla. Stat. (1991); *Filmore v. State*, 20 Fla. L. Weekly D1343 (Fla. 4th DCA 1995); *McInnis v. State*, 605 So. 2d 153 (Fla. 4th DCA), *rev. denied*, 613 So. 2d 6 (Fla. 1992). (GLICKSTEIN, STONE and WARNER, JJ., concur.)

* * *

Criminal law—Double jeopardy—Defendant who was held in contempt for violating domestic violence injunction may be prosecuted later for a substantive offense stemming from the same conduct that gave rise to the contempt adjudication—Stalking statute is neither void for vagueness nor in violation of overbreadth doctrine of the First Amendment

ROGER LEE WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2798. L.T. Case No. 93-2778-CF. Opinion filed August 2, 1995. Appeal from the Circuit Court for St. Lucie County; Larry Schack, Judge. Counsel: Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Thompson and Carol A. Licko, Special Assistant Attorneys General, Miami, for appellee.

(STEVENSON, J.) 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*, No. 84,748 (Fla. May 4, 1995); *Blount v. State*, 641 So. 2d 200 (Fla. 4th DCA), *approved*, 654 So. 2d 126 (Fla. 1995); *Koestenski v. State*, 641 So. 2d 199 (Fla. 4th DCA 1994). (PARIENTE and SHAHOOD, JJ., concur.)

* * *

Criminal law—Sentencing—Defendant should not have been assessed six points for violation of a single release program order—Erroneous written findings supporting habitual offender

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

ROGER WILLIAMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 94-2798

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Roger Williams, Defendant/Appellant/Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered on August 2, 1995, rehearing denied August 30, 1995. The decision expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. See Rule 9.030(a)(2)(A)(iv).

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
Fifteenth Judicial Circuit of Florida
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Roger Williams

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401-2299 by courier and to Michael Niemand, Esquire, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, 33101, this 6th day of September, 1995.

Attorney for Roger Williams

1

Michael J. CHILDS, Appellant,

v.

SOUTHEAST AIR CONTROL, INC., Appellee.

No. 93–1391.

District Court of Appeal of Florida, Third District.

Sept. 21, 1994.

Rehearing Denied Nov. 30, 1994.

An Appeal from the Circuit Court for Dade County; Juan Ramirez, Jr., Judge.

Gary Brookmyer, Miami, for appellant.

Hunt, Cook, Riggs, Mehr & Miller, P.A., and Susan H. Stern, Boca Raton, for appellee.

Before NESBITT, JORGENSON and LEVY, JJ.

PER CURIAM.

Childs appeals from a final judgment finding him individually liable on a check.

The principal issue in this case is whether section 673.4021(3), Florida Statutes, effective January 1, 1993, is retroactive. In *Serna v. Milanese, Inc.*, 643 So.2d 36 (Fla. 3d DCA 1994), this court held that section 673.4021(3) applies prospectively only; we affirm on the basis of *Serna*.

AFFIRMED.

2

The STATE of Florida, Appellant,

v.

Robert L. JOHNSON, Appellee.

No. 93–2734.

District Court of Appeal of Florida, Third District.

Oct. 26, 1994.

Rehearing Denied Nov. 30, 1994.

Defendant was charged with aggravated stalking. The Circuit Court, Dade County, Scott J. Silverman, J., dismissed charge on double jeopardy grounds. State appealed. The District Court of Appeal held that stalking charge was subsumed under language of injunction, the violation of which led defendant to plead no contest to charge of criminal contempt.

Affirmed.

Double Jeopardy ⇐164

Rule against double jeopardy barred subsequent prosecution for aggravated stalking, after defendant pled no contest to charge of criminal contempt based upon his violation of injunction which prohibited him from entering woman's place of residence; substantive charge was subsumed under language of injunction. U.S.C.A. Const.Amend. 5.

Robert A. Butterworth, Atty. Gen., and Michael J. Neimand, Asst. Atty. Gen., for appellant.

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

Before BASKIN, JORGENSON, 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" [1] 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 S.Ct. 2849, 2856, 125 L.Ed.2d 556, 568–69 (1993) (citations omitted). In *Dixon*, the Court applied the same-elements test to bar a prosecution for possession of cocaine with intent to 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 569–70.

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.

Calvin SHAVERS, Appellant,

v.

STATE of Florida, Appellee.

No. 94–0963.

District Court of Appeal of Florida, Fourth District.

Nov. 16, 1994.

Appeal from the Circuit Court for St. Lucie County; Dwight L. Geiger, Judge.

Richard L. Jorandby, Public Defender, and Susan D. Cline, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Joseph A. Tringali, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

The state having conceded error, based upon the decisions of this court in *Denmark v. State*, 588 So.2d 324 (Fla. 4th DCA 1991), and *Thomas v. State*, 566 So.2d 613 (Fla. 4th DCA 1990), *quashed on other grounds*, 593 So.2d 219 (Fla.1992), we remand to the trial court with direction to conduct a restitution hearing at which appellant should be present and be given an opportunity to be heard.

DELL, C.J., and GLICKSTEIN and FARMER, JJ., concur.

1. *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932).

Matt.) FIERRO, Appellant,

v.

STATE of Florida, Appellee.

No. 93–1952.

District Court of Appeal of Florida, First District.

April 4, 1995.

Defendant was convicted in the Circuit Court, Leon County, William L. Gary, J., of concealing or removing a minor child contrary to court order, false imprisonment and use of firearm in commission of a felony. Defendant appealed. The District Court of Appeal held that conviction for concealing or removing a minor child contrary to court order, after defendant had been convicted of criminal contempt based on violation of same order, was barred by double jeopardy.

Reversed in part; affirmed in part.

Benton, J., concurred and dissented and filed separate opinion.

1. Double Jeopardy ⇐135

Double jeopardy attaches to nonsummary criminal contempt prosecutions based on violation of a criminal law and subsequent prosecution for the criminal offense unless the two offenses survive *Blockburger* "same elements" test, under which there is no double jeopardy if each offense contains an element not contained in the other. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy ⇐149

Double jeopardy barred conviction for concealing or removing a minor child contrary to court's temporary custody order in divorce proceeding after defendant had already been convicted of criminal contempt based on his violation of same court order; contempt based on violation of temporary custody order, which required taking child out of jurisdiction without written consent, could not be abstracted from statutory offense, which required violation of court order and removal from state or concealment. West's F.S.A. § 787.04.

Nancy A. Daniels, Public Defender and Nada M. Car Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen. and Wendy S. Morris, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This is a direct appeal of convictions and sentences for (Count I) concealing or removing a minor child contrary to court order in violation of section 787.04, Florida Statutes; (Count II) false imprisonment; and (Count III) use of a firearm in the commission of a felony. Appellant was sentenced to five years probation on each of Counts I and II, both concurrent to the sentence of 12 years probation on Count III. Appellant contends his conviction for concealing or removing a minor child contrary to court order is barred by double jeopardy because he had previously been convicted of criminal contempt based on his violation of the same court order. We agree and reverse the conviction for that offense. We affirm the convictions and sentences for false imprisonment and use of a firearm in the commission of a felony.

While dissolution of marriage proceedings were pending, a temporary custody order was in effect providing for shared parental custody and establishing a schedule for each parent to have custody of the child. The temporary order provided that neither party was to take the child outside of the Second Judicial Circuit of the State of Florida without the prior consent of the other party in writing. On September 17, 1991, appellant failed to return his then three year old son to the child's mother, as required by the order, and could not be found for some fourteen months thereafter. In November, 1992, appellant was apprehended in South Carolina where he had been living with the child. As a result, he was found in contempt of the court's temporary custody order and sentenced to approximately six months in jail.

The State charged appellant with violating section 787.04, Florida Statutes, which provides: "It is unlawful for any person, in

violatio a court order, to lead, take, entice or remove a minor beyond the limits of this state, or to conceal the location of a minor, with personal knowledge of the order." Appellant's motion to dismiss this charge on double jeopardy grounds was denied. Appellant was found guilty as charged of this offense after a jury trial.

[1] At hearing on the motion to dismiss, the trial court took judicial notice that the contempt proceedings and the present charge arose from the same facts, but based its ruling on the distinction between criminal contempt proceedings and other criminal proceedings, although noting that the law regarding double jeopardy was in "somewhat of a state of flux" at that time. After the court's ruling, and after this case was tried and the notice of appeal filed, the United States Supreme Court issued its opinion in *United States v. Dixon*, —— U.S. ——, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). In *Dixon*, addressing the issue "whether prosecution for criminal contempt based on violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense," the Court held that double jeopardy attaches to nonsummary criminal contempt prosecutions. If the two offenses cannot survive the *Blockburger* "same elements" test, the second prosecution is barred by the double jeopardy clause. *Id. See Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under the *Blockburger* test, if each offense contains an element not contained in the other, there is no double jeopardy problem.

[2] Appellant contends the contempt conviction is subsumed by the statutory offense, because all elements of the criminal contempt are included in the statutory offense, citing *State v. Johnson*, 644 So.2d 1028 (Fla. 3d DCA 1994), for support. In *Johnson*, the court said the trial court correctly dismissed the charge of aggravated stalking by violating a prior injunction.

> 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 injunct 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, . . .; the rule against double jeopardy thus barred the subsequent prosecution for aggravated stalking.

Appellant also cites as authority *Hernandez v. State*, 624 So.2d 782 (Fla. 2d DCA 1993), in which the court concluded a conviction for indirect criminal contempt violated double jeopardy because appellant had already been prosecuted for battery and violation of an injunction for protection, which offenses were the foundation for the contempt. According to *Hernandez*, *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."

The State contends each offense contains an element the other does not: the criminal contempt requires taking the child without prior consent of the other party in writing; and the removal offense requires that the removal be beyond the limits of the state, not merely beyond the Second Judicial Circuit. Also, the removal offense contains an alternate element of concealment of the child, which could occur within the Second Judicial Circuit. Appellant responds that the contempt required violation of the court order, and the elements of the removal offense are violation of the court order and removal from the state or concealment, therefore, one who violates the statute is necessarily in violation of the court order. Further, since violating the court order requires taking the child without written consent, so does violation of the statute, and alternate ways of violating the statute are irrelevant because the contempt does not contain an element not included in the statutory offense. We agree with appellant.

"The focus in doing a *Blockburger* analysis is on the statutory elements of the offenses and not on the accusatory pleadings or proof

to . . adduced at trial in a particular case." *State v. Miranda*, 644 So.2d 342 (Fla. 2d DCA 1994). 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. *Compare State v. Murray*, 644 So.2d 533 (Fla. 4th DCA 1994) (DUI and civil traffic infraction each require proof of element the other does not); *State v. Miranda*, 644 So.2d 342 (Fla.2d DCA 1994) (aggravated stalking and injunction each required proof of elements the other did not); *State v. Dean*, 637 So.2d 355 (Fla. 1st DCA 1994) (DUI prosecution required proof of elements not contained in previous civil traffic infractions, and civil traffic infractions required proof of elements not contained in DUI).

A review of the record indicates the initial information for violation of section 787.04 had been filed well before appellant was found to be in indirect criminal contempt for violation of the temporary custody order. The Order on Indirect Criminal Contempt gives no indication of any participation in that proceeding by the state attorney's office,[1] although it indicates the public defender's office did participate. Although it is not possible to be certain, based on the record before us, there is some indication that the state attorney's office at least was aware of that contempt proceeding, and perhaps even initiated it. Although it does not affect resolution of the double jeopardy issue, the question of the state attorney's participation is of great concern because, in cases like the present one, a prior criminal contempt proceeding will foreclose the prosecutor from pursuing the statutory offense.

REVERSED in part and AFFIRMED in part.

JOANOS and LAWRENCE, JJ., concur.

BENTON, J., concurs and dissents with opinion.

BENTON, Judge, concurring and dissenting.

I would reverse and remand for a new trial on counts three and four. Appellant's convictions for falsely imprisoning his wife and for using the firearm he kept in their home to accomplish her detention (from which she liberated herself by walking out the front door in plain view of the appellant who, by her own account, never laid a hand on her) rest in part on her competent and incriminating testimony. But the victim's sister and her friend were permitted to testify over objection to the victim's version of events, as related to them by the victim. Neither of these witnesses was present when the confrontation took place. Their testimony was hearsay and should have been excluded.

1. We note that a similar situation occurred in *Dixon* with regard to appellant Foster. His estranged wife prosecuted the action for contempt for violation of the civil protection order. The Court noted that "the United States was not represented at trial, although the United States Attorney was apparently aware of the action, as was the court aware of a separate grand jury proceeding on some of the alleged criminal conduct." — U.S. at —, 113 S.Ct. at 2854. The subsequent prosecution of Foster for assault failed the *Blockburger* test and was barred by the double jeopardy clause, although four additional charges survived the test.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

ROGER LEE WILLIAMS

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 94-02798

L.T. CASE NO. 93-2778 CF
ST. LUCIE

August 30, 1995

ORDERED that appellant's motion filed August 4, 1995, for rehearing and/or request to certify conflict to the Supreme Court is hereby denied.

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

MARILYN BEUTTENMULLER
CLERK

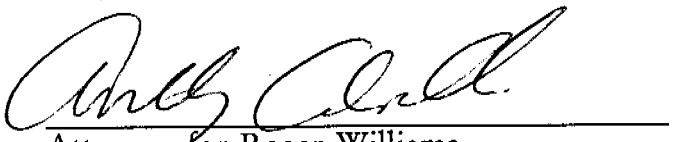
cc: Attorney General-W. Palm Beach
Public Defender 15
Attorney General-Miami

/CH

AC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Appendix has been furnished to Joan Fowler, Senior Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401-2299 by courier and to Michael Niemand, Esquire, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, 33101, this 6th day of September, 1995.



Attorney for Roger Williams