IN THE SUPREME COURT OF FLORIDA

CASE NO. 86476

ROGER WILLIAMS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The Petitioner, **Roger Williams,** was the Appellant below. The Respondent, the **State of Florida,** was the Appellee below. The parties will be referred to as they stand before this Court. The symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts as a substantially accurate account of the proceedings below.

QUESTION PRESENTED

WHETHER THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND, IF SO, WHETHER THIS COURT SHOULD EXERCISE ITS JURISDICTION TO GRANT REVIEW.

SUMMARY OF THE ARGUMENT

Although the instant decision conflicts with that of the Third District this Court should decline to exercise its jurisdiction herein. The case that it is in conflict with has recently been argued in this Court and denial of jurisdiction would be an implicit overruling of said case and approval of the case the Fourth District herein relied upon.

ARGUMENT

THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL, HOWEVER, THIS COURT SHOULD NOT EXERCISE ITS JURISDICTION TO GRANT REVIEW.

The Fourth District, in the instant case, held that double jeopardy permits the successive prosecution for aggravated stalking in violation of an injunction after the Petitioner has been found in contempt for violating the same injunction. The Fourth District relied on the Second District's decision in State v. Miranda, 644 So. 2d 342 (Fla. 2nd DCA 1994).

Although the Fourth District's and the Second District's decisions is in conflict with the Third District's decision in State v. Johnson, 644 So. 2d 1028 (Fla. 3d DCA 1994) review accepted, No. 84,854, this Court should still decline jurisdiction. By declining jurisdiction herein this Court will be implicitly affirming the instant decision and reversing State v. Johnson, supra.

CONCLUSION

Based on the foregoing, Respondent requests this Court to decline to exercise its discretion and deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON JURISDICTION** was furnished by mail to **ANTHONY CALVELLO,** Attorney for Petitioner, Criminal Justice Building, 6th Floor, 421 3rd Street, West Palm Beach, Florida 33401 on this 13 day of September, 1995.

MICHAEL J. NEIMAND
Assistant Attorney General

mls/

IN THE SUPREME COURT OF FLORIDA

CASE NO.

ROGER WILLIAMS,

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_____/

APPENDIX

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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 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