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IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,476

**FILED**

SID J. WHITE

FEB 7 1996

**ROGER WILLIAMS,**

Petitioner,

CLERK, SUPREME COURT

By

Chief Deputy Clerk

-vs-

**THE STATE OF FLORIDA,**

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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**RESPONDENT'S BRIEF ON THE MERITS**

ROBERT A. BUTTERWORTH  
Attorney General

✓ **MICHAEL J. NEIMAND**  
Assistant Attorney General  
Florida Bar No. **0239437**  
Office of the Attorney General  
Department of Legal Affairs  
401 N.W. 2nd Avenue, Suite N921  
Post Office Box 013241  
Miami, Florida 33101  
(305) 377-5441 Fax No. 377-5655

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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 "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 State accepts the Petitioner's statement of the case and facts as a substantially accurate account of the proceedings. However, the State makes the following additions thereto as it relates to the charges and findings of contempt.

A temporary injunction for protection against repeat violence was entered against the Petitioner, enjoining him from assaulting, battering, sexually assaulting or otherwise physically abusing the victim and enjoining him from visiting, calling or trespassing on the victim's home. (A 1-2). The Petitioner violated the injunction by visiting the victim at her residence and was so charged. (A. 3-6).

**POINT INVOLVED ON APPEAL**

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS THE CHARGE OF AGGRAVATED STALKING IN VIOLATION OF AN INJUNCTION ON DOUBLE JEOPARDY GROUNDS WHERE THE PETITIONER WAS CONVICTED OF 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 Petitioner has been found in contempt of court for violating the injunction for contacting and threatening 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 or a threat. 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 DID NOT ERR IN DENYING THE MOTION TO DISMISS THE CHARGE OF AGGRAVATED STALKING IN VIOLATION OF AN INJUNCTION ON DOUBLE JEOPARDY GROUNDS WHERE THE PETITIONER WAS CONVICTED OF CONTEMPT FOR VIOLATING THE INJUNCTION ON CHARGES CONTAINING DIFFERENT ELEMENTS FROM THE AGGRAVATED STALKING CHARGE.

In the instant case Petitioner was found to be in contempt of court for violating an injunction for protection against repeat violence. He was then charged by information with aggravated stalking in violation of the same injunction. Petitioner's motion to dismiss the aggravated stalking charge on double jeopardy grounds was denied. He now contends this was error because the aggravated stalking charge is a lesser included offense of the contempt charge and therefore its prosecution is barred by double jeopardy principles.

The determination of whether the same conduct permits the State to charge and convict on two separate offenses requires a two prong inquiry: (1) Initially, this Court must determine whether the legislature intended to create two separate offenses, both of which could be punished; and (2) if it did, this Court must next decide whether the second prosecution is barred by the double jeopardy clause. State v. Smith, 547 So. 2d 613 (Fla. 1989).

As to the first prong, the Florida legislature in Section 775.02 Florida Statutes (1993) has determined that the same conduct can support both a contempt conviction and a substantive crime conviction. Said section provides:



### **775.021. Rules of construction**

(1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

(2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.

(3) This section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.

(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.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

(Emphasis added).

This statute is clear legislative intent that the same conduct can be used to find a defendant guilty of contempt and a substantive criminal charge. Therefore, the substantive criminal charge can be separate criminal conviction as long as it does not violate the second prong, the double jeopardy principles of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L. Ed. 306 (1932).

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, *supra*. 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.

Application of the Blockburger test is not straightforward in situations where a defendant is held in contempt of court for violating a court order enjoining the defendant from engaging in certain conduct and is later prosecuted for a substantive offense stemming from the same conduct that gave rise to the contempt order. Three of the Justices in Dixon would have applied Blockburger by comparing the elements

of the offense of contempt of court to the statutory elements of the substantive offense charged. Dixon, 509 U.S. at \_\_\_, 113 S. Ct. at 2865, 125 L. Ed. 2d at 579. (Rehnquist, C.J. concurring in part and dissenting in part, joined by O'Connor and Thomas, J.J). Two of the Justices would have looked not only to the generic elements of contempt but also to the terms of the court order involved, i.e., the facts needed to show a violation of a specific court order. Dixon, 509 U.S. at \_\_\_, 113 S. Ct. at 2856-59, 125 L. Ed. 2d at 568-72 (Scalia, J. joined by Kennedy, J.).

This Court has not yet ruled on which of the two foregoing standards applies in Florida. However, the majority of the District Courts that were faced with this question have adopted the approach expressed by Justice Scalia.

In McGee v. State, 435 So. 2d 854 (Fla. 1st DCA 1983) the defendant, while waiting to be arraigned, jumped up, ran across the courtroom, knocked over the speaker's podium, bumped into one of the assistant public defenders, and ran down the hallway outside the courtroom. The defendant was pursued by bailiffs and was intercepted by another officer in front of the elevator, where a struggle ensued until defendant was finally subdued and returned to the courtroom. Upon return to the courtroom, the defendant was held in contempt of court for disrupting the court proceedings.

The defendant was subsequently charged with escape which he moved to dismiss on double jeopardy grounds. The District Court affirmed the trial court's denial of the motion finding that under Blockburger the elements of the offense of contempt in this case was the disruption of the courtroom by knocking over the podium and

bumping into an assistant public defender. Since the District Court found an essential element of contempt to contain a factual underpinning which differed from the escape, double jeopardy did not bar the subsequent prosecution for escape.

In State v. Miranda, 644 So. 2d 342 (Fla. 2nd DCA 1994) the Court when faced with the exact same situation as herein, 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 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. 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 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 act 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 345. The Court then found that the contempt charge also required proof of violation 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, 639 So. 2d 1098 (Fla. 2nd DCA 1994) an injunction for protection prohibiting the defendant from, among other things, committing battery on or entering the residential premises of former girlfriend. 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 aggravated 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.

In State v. Johnson, 644 So. 2d 1078 (Fla. 3d DCA 1994), the Third District affirmed an 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 domestic violence injunction, a crime for which defendant had previously been convicted. The Court reached this conclusion by looking at the contents of the entire injunction and not the contents of the actual charging documents. This holding is erroneous since it totally failed to focus on the elements of contempt.

The State submits that the First, Second, and Fifth District Court's have correctly concluded that the elements of contempt for double jeopardy purposes are knowledge of an order, the willful violation of the order and the factual violation thereunder. This is the correct holding because it upholds the State's ability and interest in punishing crime. Said holding also upholds the practical utility of domestic violence injunctions which is to advance protection and prevention of physical, and mental abuse arising from domestic situations. To preclude subsequent prosecution for crimes after a finding of contempt based on the same act would encourage abusive persons to continue violent criminal actions against their domestic partners or children

without risking any penalty more severe than the maximum of six months for contempt. In the alternative, the State in order to insure proper punishment for criminal conduct, would force the victims of domestic violence to forgo the protection of domestic violence injunctions. See Commonwealth v. Allen, 468 A.2d 363 (Pa. 1984).

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

The criminal contempt charge arose out of the simple entering of the victim's residence and threatening her, required only proof of the foregoing facts and proof of a knowing and willful violation of the court ordered injunction. Richardson v. Lewis, *supra*. 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.

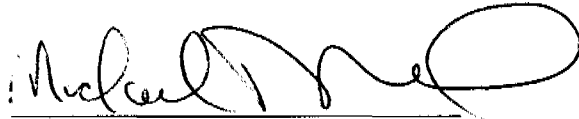


**CONCLUSION**

Based on the foregoing, Respondent requests that this Court approve of the decision below.

Respectfully submitted,

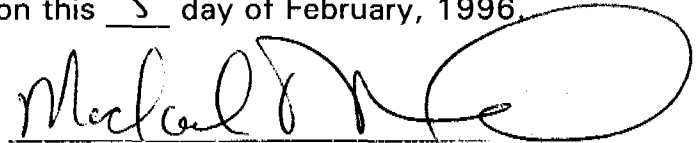
ROBERT A. BUTTERWORTH  
Attorney General



**MICHAEL J. NEIMAND**  
Assistant Attorney General  
Florida Bar No. 0239437  
Office of the Attorney General  
Department of Legal Affairs  
401 N.W. 2nd Avenue, Suite N921  
Post Office Box 013241  
Miami, Florida 33101  
(305) 377-5441 Fax No. 377-5655

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS 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 5 day of February, 1996.



**MICHAEL J. NEIMAND**  
Assistant Attorney General

mls/

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---

**APPENDIX**

**ROBERT A. BUTTERWORTH**  
Attorney General

**MICHAEL J. NEIMAND**  
Assistant Attorney General  
Florida Bar No. 0239437  
Office of the Attorney General  
Department of Legal Affairs  
401 N.W. 2nd Avenue, N-921  
Post Office Box 013241  
Miami, Florida 33101  
305-377-5441 Fax No. 377-5655