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IN THE SUPREME COURT OF FLORIDA

ROGER LEE WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,476

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Appellant and Appellee 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 "RB" will denote Respondent's Brief.

STATEMENT OF THE CASE

Petitioner relies on the *Statement of the Case* as found in his Initial Brief on the Merits.

STATEMENT OF THE FACTS

Petitioner relies on the *Statement of the Facts* as found in his Initial Brief on the Merits.

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 instant aggravated assault prosecution alleges in the information filed against Petitioner, Roger Lee Williams, that in violation of a domestic violence injunction between the dates of October 16, 1993, and December 1, 1993, Petitioner did "willfully, maliciously and repeatedly follow or harass the said Rolanda Townsend in violation of Florida Statute 784.048(4)." R 12.

On October 25, 1993, Rolanda Townsend obtained a protective order injunction against Petition. 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 convicted of violating this protective order/domestic violence injunction issued on October 25, 1993. R 8. Petitioner's subsequent motion to dismiss the aggravated stalking prosecution on the basis of the double jeopardy clause was denied by the trial judge.

Petitioner submits that the double jeopardy clause barred the instant prosecution for aggravated stalking where Petitioner had previously been convicted and sentenced for criminal contempt for violating the domestic violence injunction based on the same conduct. In the instance case, as in *United States v. Dixon*, 509 U.S. __, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), the substantive offense of aggravated stalking was subsumed under the language of the domestic violence injunction. There is no conceivable way in which Petitioner could have committed this type of aggravated stalking (violation of a

court ordered domestic violence injunction)[1] without also violating the terms of the domestic violence injunction, a crime for which he had already been convicted.

Respondent in its brief relies primarily of the Second District's decision in *State v. Miranda*, 644 So. 2d 342 (Fla. 2d DCA 1994), to support its argument. However, the *Miranda* court's analysis is wholly inadequate and superficial. The *Miranda* court engaged in the "same elements" test of *Blockburger*[2] to reach the unremarkable result that the domestic violence injunction issued against the defendant had different "elements" than the aggravated stalking statute prescribed by Section 784.048(4), *Fla. Stat.* (Supp. 1992). *Miranda*, 644 So. 2d at 344. In fact, the Second District went one step further and decided that it really "must compare the elements of the violated conditions of the injunction to the remaining elements of aggravated stalking." *Id.* at 345.

The problem with this analysis is that it misconstrues or overlooks the central holding of the *Dixon* court that this type of unique circumstances is more akin to double jeopardy "felony murder" analysis than typical *Blockburger* analysis:

> In this situation, in which the contempt sanction is imposed for violating the order through commission of the incorporated drug offense, the later attempt to prosecute Dixon for the drug offense resembles the situation that produced our judgment of double jeopardy in *Harris v. Oklahoma*, 433 U.S. 682, 53 L. Ed. 2d 1054, 97 S. Ct. 2912 (1977) (per curiam). There we 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. We have described out terse per curiam in *Harris* as

---

[1] Petitioner was charged with aggravated stalking in violation of § 784.048, *F.S.* (Supp. 1992). Said statute provides in part:

> (4) Any person who, after an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony ...

[2] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932).

> standing for the proposition that, 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, 65 L. Ed. 2d 228, 100 S. Ct. 2260 (1980). Accord, *Whalen v. United States*, 445 U.S. 684, 694, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980). So too here, the "crime" of violating a condition of release cannot be abstracted from the "element" of the violated condition.
>
> *Id.* at 2857.

This was the analysis utilized by the Third District in *State v. Johnson*, 644 So. 2d 1028, 1029 (Fla. 3d DCA 1994) [See Appendix 1] and the First District in *Fierro v. State*, 653 So. 2d 447, 449 (Fla. 1st DCA 1995) [See Appendix 2]. As the Third District explained in *Johnson*: "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." *Johnson*, 644 So. 2d at 1029.

Justice Souter writing in a separate concurring in part and dissenting in part opinion in *Dixon*, articulated the "felony murder" double jeopardy rule as follows:

> In *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977) (*per curiam*), we held that prosecution for a robbery with firearms was barred by the Double Jeopardy Clause when the defendant had already been convicted of felony murder comprising the same robbery with firearms as the underlying felony. Of course the elements of the two offenses were different enough to permit more than one punishment under the *Blockburger* test: felony murder required the killing of a person by one engaged in the commission of a felony, see 21 Okla. Stat., Tit. 21, § 701 (1971); robbery with firearms required the use of a firearm in the commission of a robbery, see §§ 801, 791. *Harris v. State*, 555 P. 2d 76, 80 (Okla. Crim. App. 1976) (Oklahoma Court of Criminal Appeals decision reversed by our decision in *Harris*).
>
> In *Harris*, however, we held that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." We justified that conclusion in the circumstances of the cases by quoting

> *Nielsen*'s explanation of the *Blockburger* test's insufficiency for determining when a successive prosecution was barred. "'[A] person [who] has been tried and convicted for a crime which has various incidents included in it,...cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.' *In re Nielsen*, [131 U.S.,] at 188 [96 S. Ct., at 676]." 433 U.S., at 682-683, 97 S. Ct. at 2913 (citations and footnote omitted).
>
> Just as in *Nielsen*, the analysis on *Harris* turned on considering the prior conviction in terms of the conduct actually charged. While that process might be viewed as a misapplication of a *Blockburger* lesser-included-offense analysis, the crucial point is that the *Blockburger* elements test would have produced a different result. The case thus follows the holding in *Nielson* and conforms to the statement already quoted from *Brown*, that the *Blockburger* test is not the exclusive standard for determining whether the rule against successive prosecutions applies in a given case.

Id. at 2887.

Thus, on the authority of *United States v. Dixon*, *Harris v. Oklahoma*, *Johnson*, and *Fierro*, the trial court reversibly erred in denying Petitioner's motion to dismiss the instant aggravated stalking charge on the basis of the double jeopardy clause. The Second District in *Miranda*, and the Fourth District here clearly misapplied the *Dixon* decision to arrive at the erroneous conclusion that the double jeopardy clause does not bar the subsequent aggravated stalking charge filed against the Petitioner.

Finally, Respondent suggests to this Court that "[t]o preclude subsequent prosecution for crimes after a finding of contempt based on the same act will encourage abusive persons to continue violent criminal actions against their domestic partners or children without risking any penalty more severe that 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." RB 13.

This dilemma suggested by the Respondent is really non-existent. It is the state

which can choose which alternative criminal sanction they wish to pursue, the substantive criminal offense or the indirect criminal contempt based on the circumstances. However, the double jeopardy clause prohibits the state from pursuing *both* as in the instant case. The interests at stake in avoiding successive prosecutions is the central protection provided by the clause. See *Green v. United States*, 355 U.S. 184, 187, 78 S. Ct. 221 (1957).

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 Georgina Jimenez-Orosa, 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 February, 1996.

Attorney for Roger Lee Williams

IN THE SUPREME COURT OF FLORIDA

ROGER LEE WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,476

APPENDIX

1. *State v. Johnson*, 644 So. 2d 1028 (Fla. 3d DCA 1994) 1-2

2. *Fierro v. State*, 653 So. 2d 447 (Fla. 1st DCA 1995) 3-5

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).

Cite as 653 So.2d 447 (Fla.App. 1 Dist. 1995)

Matthew 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. Carey, 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

violation of 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 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, ...; 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

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to be 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.

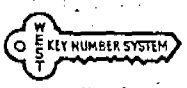
REVERSED in part and AFFIRMED in part.

JOANOS and LAWRENCE, JJ., concur.

BENTON, J., concurs and dissents with opinion.

BENTON, Judge, concurring and dissenting.

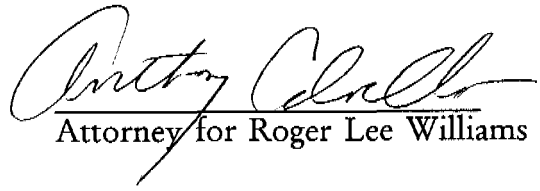
I would reverse and remand for a new trial on counts three and four. Appellant's convictions for falsely imprisoning his wife and for using the firearm he kept in their home to accomplish her detention (from which she liberated herself by walking out the front door in plain view of the appellant who, 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Georgina Jimenez-Orosa, 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 February, 1996.



Attorney for Roger Lee Williams