IN THE SUPREME COURT OF FLORIDA

ROBERT JAMES WALKER,

Petitioner,

vs.

THE HONORABLE E. RANDOLPH BENTLEY, as Circuit Judge Judge of the Tenth Judicial Circuit,

Respondent.

Case No. 86,568

Second DCA No. 95-001084

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The parties will be described respectively as "petitioner" and "respondent." The abbreviation "App." denotes the appendix to the petition for a writ of prohibition filed in the District Court of Appeal.

STATEMENT OF THE FACTS

The petitioner all but ignores the events in the case prior to the issuance of the injunction on July 20, 1994 (App. 5-6). Certain of those events are of consequence to the question whether this case ultimately presents facts upon which the certified questions could be based.

On July 13, 1994, the former wife of the petitioner sought injunctive relief from respondent based upon these sworn allegations, which are undenied:

1. A prior domestic violence injunction had been issued in respondents court against petitioner and had expired in February 1994, approximately five months earlier (App. 1).

2. Following a threat to physically harm her "and anyone she ever dates", the petitioner was arrested on June 2, 1994, for battering the former wife when he refused to leave her premises (App. 1).

3. Upon his arrest, the petitioner threatened the former wife, "This is the last time you'll put me in jail. I'll get you for this" (App. 1).

On the same day, a temporary injunction was then issued (App. 3), followed by a permanent injunction on July 20, 1994, issued after a hearing (App. 5). The nature of these injunctions, and the significance thereof will be discussed under Argument, infra.

Although the marriage in question had been dissolved, the dissolution action, number DMAR GCF92-06448(02), was still pending (App. 1), probably because of a child custody issue (App. 1).

The significance of this procedural history is that this cause in actuality presents a case of violation of an injunction against

repeat domestic violence, and thus involves Chapter 784, Florida Statutes, rather than Chapter 741.

Florida has two entirely different mechanisms for dealing with the sad state of our violent society. One is the statutory scheme found in Section 784.046, Florida Statutes, which deals with repeat violence by any person (whether or not a family member of the victim) against the same victim or a member of that victim's immediate family, Section 784.086(1)(b), Florida Statutes. As amended in 1994, it contained no specific prohibition against use of indirect criminal contempt sanctions.

The other mechanism is found in Sections 741.28, 741.29, 741.2901, 741.2902, and 741.30, Florida Statutes. This requires no prior act, but does require that the violator and victim be members of the same family or household, who have resided or are residing in the same dwelling unit. That statute is alleged to be involved here, and it significantly contained a legislative pronouncement that its provisions are not to be enforced by indirect criminal contempt, Section 741.2901(2), Florida Statutes, Walker v. Bentley, 660 So.2d 313, 316 (Fla. 2d DCA 1995).

Because of these underlying facts, this case, as shown under point I, argument, infra, actually presents a matter involving not Chapter 741, but Chapter 784.

The original petition for injunction does not specify the chapter under which it is brought (App. 1). However, it does reflect that the marital dissolution proceeding between the petitioner and his former wife was still pending (App. 1).

Although it is true that the injunctions thereafter issued are described as bring issued under Chapter 741, a civil action, pleadings are deemed to seek general relief and are to be construed to secure a just determination, Rules 1.010 and 1.110(b), Florida Rules of Civil Procedure.

In the argument portion of his petition in the Second District Court of Appeal, the petitioner conceded as much by admitting:

> Injunctions for protection against domestic violence are statutorily prescribed. Similarly, the procedures available to a court to enforce such an injunction are statutorily prescribed.
>
> Courts are not limited to issuance of injunctions pursuant to section 741.30 in instances where a complainant comes before the court alleging acts of domestic violence. Courts presented with such a complaint can exercise their equitable jurisdiction and issue injunctions proscribing whatever conduct the court deems appropriate to prevent further acts of violence. When an injunction of this nature is entered, the court has the inherent power to enforce its injunction by any available legal means, including indirect criminal contempt. (Emphasis supplied). (Petitioner for Writ of Prohibition, unnumbered fifth page).

The District Court of Appeal did not comment upon the foregoing concession.

SUMMARY OF ARGUMENT

This case does not actually raise the issues described in the certified questions. Moreover, the petitioner conceded that the trial court had inherent power to punish indirect criminal conduct, thus rendering the arguments here moot. Regardless of that concession, this inherent power is indisputably established by long existing precedent.

Issues Presented

POINT I

THIS CASE DOES NOT PRESENT A GENUINE DISPUTE OVER ISSUES CERTIFIED BY THE DISTRICT COURT OF APPEAL BECAUSE THE PETITIONER CONCEDED BELOW THE INHERENT POWER OF THE TRIAL COURT TO ENFORCE ITS INJUNCTION BY INDIRECT CRIMINAL CONTEMPT.

POINT II

THE AMENDMENTS TO CHAPTER 741 DO NOT APPLY TO THIS CASE BECAUSE THE ORDER IN QUESTION WAS IN FACT BASED UPON VIOLATIONS OF CHAPTER 784.

POINT III

IF REACHED, THE FIRST QUESTION CERTIFIED SHOULD CLEARLY BE ANSWERED IN THE NEGATIVE AND THE SECOND IN THE AFFIRMATIVE.

Question No. 1:
The May & Shall Issue

Question No. 2:
The Inherent Power Issue

ARGUMENT

I.

THIS CASE DOES NOT PRESENT A GENUINE DISPUTE OVER ISSUES CERTIFIED BY THE DISTRICT COURT OF APPEAL BECAUSE THE PETITIONER CONCEDED BELOW THE INHERENT POWER OF THE TRIAL COURT TO ENFORCE ITS INJUNCTION BY INDIRECT CRIMINAL CONTEMPT.

As established in the statement of the facts, supra, the injunction can be sustained on any of these grounds available under the facts of this case:[1]

1. Injunction against repeat domestic violence (Chapter 784).

2. Injunction in support of the pending marital dissolution case.

3. Injunction pursuant to the admitted inherent equitable powers of the court.

Thus, the argument of petitioner is simply that the only error was mislabeling of the order to show cause, a printed form obviously supplied as part of the statutory mandate to provide a victim with simplified procedures.[2] In short, this Court is at most be asked to send this case back to the trial court for the

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[1] The quoted language of the original petition in the District Court of Appeal clearly shows this case to involve an as applied as opposed to a facial attack, and accordingly the case should be limited to the facts.

[2] Section 741.30(2)(c)(2), Florida Statutes.

mere purpose of restyling an order.[3] This would be contrary to Rules 1.010 and 1.110(b), Florida Rules of Civil Procedure.[4]

Therefore, it is questionable whether there is jurisdiction in the cause. This Court has postponed acceptance of jurisdiction (Order of October 13, 1995), and should now conclude not to exercise it in this cause.

II.
THE AMENDMENTS TO CHAPTER 741 DO NOT APPLY TO THIS CASE BECAUSE THE ORDER IN QUESTION WAS IN FACT BASED UPON VIOLATIONS OF CHAPTER 784.

It is uncontested that a prior injunction had existed in this case. Therefore, the next injunction was necessarily issued because of a prior violation and should be deemed to be brought under Chapter 784. This being so, and the Legislature not having specified that indirect criminal contempt cannot be utilized under Chapter 784, such use is entirely proper and should be permitted. This renders the certified questions moot.

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[3] Moreover, it is important to note that the only order questioned here is an order to show cause, not a judgment of contempt, which might not ever be issued. Thus, it would be entirely appropriate at this early stage from the trial court on its own motion to restyle the order to show cause even if this Court were to agree with petitioner that respondent lacked inherent power in the first place.

[4] The underlying action was, of course, civil not criminal, because it was an equitable action for an injunction.

III.
IF REACHED, THE QUESTION CERTIFIED SHOULD CLEARLY BE ANSWERED IN THE NEGATIVE AND THE SECOND IN THE AFFIRMATIVE.

Question No. 1:
The May & Shall Issue

It is quite clear that the word "shall" in the context at hand, where the Legislature has without authority limited the power of the courts, may be interpreted as permissive, and not mandatory. Rich v. Ryals, 212 So.2d 641 (Fla. 1968); State ex rel. Harrington v. Genung, 300 So.2d 271 (Fla. 2d DCA 1974); Simmons v. State, 36 So.2d 207 (Fla. 1948). Therefore, the opinion of the District Court of Appeal in preserving Section 741.30(8)(a) was entirely appropriate so as to avoid the necessity of declaring that Section unconstitutional[5]. Interestingly, neither the dissent below nor the petitioner here discuss this issue. Question No. 1 should be answered in the negative.

Question No. 2:
The Inherent Power Issue

If Section 741.30(8)(a) must be construed as mandatory, it is then rendered manifestly unconstitutional as an unauthorized legislative intrusion into the inherent powers of the judicial branch, and thus a violation of the constitutionally specified separation of powers, Article II, Section 3, Florida Constitution.

Under longstanding Florida decisions, largely ignored by the dissent, and totally ignored by petitioner, the power of contempt

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[5] Walker v. Bentley, 660 So.2d 313 at 320, 321 (Fla. 2d DCA 1995).

is an inherent prerogative of the judicial branch. This Court long ago held that:

> But, as all persons do not at all times appreciate or recognize their obligations of respect for the tribunals that are established by governmental authority, to maintain right and justice in the various relations of human life, the courts and judges have, under constitutional government, inherent power by due course of law to appropriately punish by time or imprisonment or otherwise, any conduct that in law constitutes an offense against the authority and dignity of a court or judicial officer in the performance of judicial functions. And appropriate punishment may be imposed by the court or judge whose authority or dignity has been unlawfully assailed . . .
>
> An offense against the authority or the dignity of a court or of a judicial officer when acting judicially is called contempt of court, a species of criminal conduct. Contempts may be direct or indirect or constructive, or criminal or civil, according to their essential nature . . . Contempts of court are committed against courts and judicial officers who are vested with a portion of "the judicial power of the state," when judicial functions are interfered with or impugned by the contemptuous acts or conduct . . .
>
> An indirect or constructive contempt is an act done, not in the presence of a court or of a judge acting judicially, but at a distance under circumstances that reasonably tend to degrade the court or the judge as a judicial officer, or to obstruct, interrupt, prevent, or embarrass the administration of justice by the court or judge.

(Emphasis supplied). Ex parte Earman, 85 Fla. 297, 313, 95 So. 755, 760 (1923)(citations omitted).

This authority of the legislature in this area is limited to "the power to determine how and to what extent the courts may

punish, criminal conduct including contempt." A.A. v. Rolle, 604 So.2d 813 at 815 (Fla. 1992)(emphasis supplied). Otherwise, from early days, it has been the law of Florida that the power "is omnipotent and its exercise is not to be enquired into by any other tribunal." Ex parte Edwards 11 Fla. 174, 186 (1867). This power exists independently of any statutory grant, Ducksworth v. Boyer, 125 So.2d 844, 845 (Fla. 1960), and even if ostensibly granted by statute, it cannot be withdrawn. State ex rel. Franks v. Clark, 46 So.2d 488 (Fla. 1950).

This Court in In re Hayes, 72 Fla. 558, 73 So.2d 362, 364-365 (1916):

> It is of paramount importance that each department of our government should be protected and preserved against the attempts of designing persons to undermine its authority and destroy its efficiency. The executive branch of our government is charged with the duty of enforcing the law as made by the Legislature and construed by the courts, yet the officers of that branch of the government whose duties are largely, if not entirely, ministerial, are protected by law from interference with the discharge of their duties. The legislative branch, whose acts are subject to the courts' construction, has the power vested in it by constitutional provision to punish by fine or imprisonment any contempt committed in its presence, and so the courts, whose duty it is to construe the law and upon whom there is no check save the sovereign power of the people and the conscience, honor, ability, and mental honesty of the judges, have the inherent power to punish summarily any effort on the part of a citizen to destroy their authority and efficiency. (Emphasis supplied)

Countless citations can be set forth supporting the uncontradicted inherent power, see e.g., R.M.P. v. Jones, 419 So.2d

618 (Fla. 1982); Ducksworth v. Boyer, supra; State ex rel. Franks v. Clark, supra.

Nor are the federal authorities to the contrary. In Young v. United States ex rel. Vuitton, 481 U.S. 787, 796, 95 L.Ed. 2d 740, 751, 107 So.Ct. 2124 (1987), the Supreme Court in the course of a comprehensive review of the inherent contempt power duty dating back to the twelfth century, said:

> The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches. "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450, 55 L.Ed. 797, 31 S.Ct. 492 (1911). As a result, "there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience." Ibid. Courts cannot be at the mercy of another branch in deciding whether such proceedings should be initiated.

(Footnotes omitted).

The law of the great majority of the states is identical. In a comprehensive annotation at 121 A.L.R. 216, 217, the annotation declares:

> . . . the general rule follows that the legislature cannot abridge or destroy the judicial power to punish for contempt, since a power which the legislature does not give, it cannot take away.

This Court, little more than a year ago, recognized that the legislature in the situation of Chapter 741, had created a separation of powers issue by purporting to eliminate the judicial power of inherent criminal contempt to punish those who violate judicial orders and in the process had created "an administrative Frankenstein." In re Report of the Com'n on Family Courts., 646 So.2d 178, 180 (Fla. 1994).

This concern was well placed. The statute, if construed as petitioner desires, would leave a trial court powerless to restrict the opportunity for future violence, and to punish those who would ignore its authority. The power of civil contempt is utterly beside the point as civil contempt necessarily requires an opportunity to purge the celebrated "key to the jail." How does one "purge" a battery that has already occurred?[6]

Nor can passing the buck to a state attorney vindicate the authority of a court. Indeed, to seek is itself invasive of the executive prerogative to prosecute or not. Indeed, the Legislature created a "Frankenstein" deserving of the fate accorded it by the majority.

For all of these reasons, the second question is also to be answered in the affirmative if reached.

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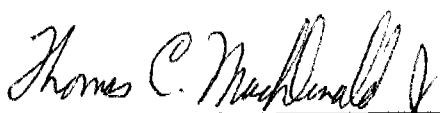
[6] This case does not remotely involve a situation of failure to attend a drug treatment program or a failure to pay support as suggested by the dissent, Walker v. Bentley, 660 So.2d 313 at 327, n.13). Such facts are not before this Court. Instead, it presents the threat to repeat brutalizing a former spouse - an issue of possible life and death requiring the strong sanction of indirect criminal contempt.

CONCLUSION

The case should be dismissed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Deborah K. Brueckheimer, Esquire, Public Defender's Office, Polk County Courthouse, Post Office Box 9000, Drawer-PD, Bartow, Florida 33830-9000; and, Margot Osborne, Esquire, Assistant State Attorney, State Attorney's Office, Bartow, Florida 33830; this 18th day of December, 1995.

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