ORIGINAL

IN THE SUPREME COURT OF FLORIDA

THOMAS D. STEINER,

Petitioner,

vs. Case No. 86,903

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

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as set forth in his initial brief on the merits.

SUMMARY OF THE ARGUMENT

The word "shall" in Section 741.30(8)(a), Florida Statutes (Supp. 1994), should be interpreted as mandatory because it is clear from the statute that the legislature wished to place the handling of violations of domestic violence injunctions in county court as opposed to circuit court. In doing so the legislature did not encroach on the power of the judiciary. The regulation of domestic violence overlaps the constitutional domain of the legislature and the judiciary, and taking this regulation away from the judiciary's indirect criminal contempt power did not deprive the courts of any essential power. Thus, the legislature did not unconstitutionally encroach on the judiciary's powers by enacting this statute. Because there is no encroachment, the courts must honor the unambiguous statute.

ARGUMENT

ISSUES

IS THE WORD "SHALL" AS USED IN SECTION 741.30(8)(A), FLORIDA STATUTES (SUPP. 1994), TO BE INTERPRETED AS MANDATORY RATHER THAN AS PERMISSIVE OR DIRECTORY?

IF INTERPRETED AS MANDATORY, IS SECTION 741.30(8)(A), FLORIDA STATUTES (SUPP. 1994), AN UNCONSTITUTIONAL ENCROACHMENT ON THE CONTEMPT POWER OF THE JUDICIARY IN VIOLATION OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION?
(Certified Questions from Second District Court's Walker opinion)

Before even addressing the issues (which Respondent does in Point III of his brief), Respondent questions this Court's jurisdiction. Petitioner will address these concerns.

Respondent claims in his points I and II that even though the injunction in this case was filed under Section 741.30, Florida Statutes (Supp. 1994), this should really be treated as having been filed under Section 784.086(1)(b), Florida Statutes (Supp. 1994); because the facts "fit" under Section 784.086. Respondent assumes, of course, that this Court will ignore or reject all of the cases presently pending before this Court attacking Section 784.086 for the same reasons that Section 741.30 is presently under attack. See, Lopez v. Bentley, Case No. 86,594; Ramirez v. Bentley, Case No. 86,905; and Ross v. Bentley, Case No. 86,904. Thus, Respondent's desire to change over to another statute will not save this issue.

Respondent's argument also treats the contempt process as a mere matter of formality that need not be strictly construed. This is an erroneous argument. Indirect criminal contempt proceedings mandate that proper procedural safeguards be followed, and greater procedural safeguards are required in criminal contempt proceedings than in civil contempt proceedings. Pugliese v. Pugliese, 347 So. 2d 422 (Fla. 1977); A.A. v. Rolle, 604 So. 2d 813 (Fla. 1992). A criminal contempt proceeding is "effectively criminal in nature and persons accused of [criminal] contempt are as much entitled to the basic constitutional rights as are those accused of violating criminal statutes." Aaron v. State, 284 So. 2d 673 at 675 (Fla. 1973) (footnotes omitted), clarified, 345 So. 2d 641 (Fla. 1977), quoted with approval, Andrews v. Walton, 428 So. 2d 663 at 665 (Fla. 1983). Fla. R. Crim. P. 3.840 sets forth the procedure to follow in indirect criminal contempt cases, and due process requires that the defendant be given notice of the charge. Griblin v. Sullivan, 157 Fla. 496, 26 So. 2d 509 (1946).

One of the fundamental aspects of advising the accused of what he is being charged with is the statute violated and the elements of that statute. To try and claim that the accused can be convicted of any crime listed in the statutes just because the "facts fit" regardless of what the charging document states would be a denial of due process. This is not an "error or omission of the citation of the statute" (Fla. R. Crim. P. 3.140(d)) that is alleged here, for the statute charged is applicable to the Petitioner's factual situation. Respondent cannot now claim a

different statute is really the one that should have been charged because it is more convenient to do so. This is not a mere "mislabeling" as claimed by Respondent. Petitioner was charged with violating Section 741.30, Florida Statutes (Supp. 1994); and the facts alleging that violation fit the statute charged. Respondent's attempts to change statute at issue on the appellate level is a serious amendment that would change the elements of the charge. Such a substantive change would highly prejudice the Petitioner in his attempts to defend himself against the charges. Respondent's argument on this point, therefore, must be rejected.

Petitioner relies on his initial brief in regards to Respondent's point III.

CONCLUSION

Based on the foregoing argument and authorities, this Court should grant Petitioner's Writ of Prohibition.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Thomas C. MacDonald, Jr., Shackleford, Farrior, Stallings & Evans, P.A., P.O. Box 3324, Tampa, Florida 33601 (813)273-5000 on this 13th day of June, 1996.

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